LAW AND CUSTOM OF THE CONSTITUTION

BY

SIR WILLIAM R. ANSON, BART., D.C.L.

OF THE INNER TEMPLE, BARRISTER-AT-LAW
WARDEN OF ALL SOULS COLLEGE, OXFORD

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INTRODUCTION

THIS volume completes the survey which I have attempted to make of the departments of Government, their constitution and working, and of the relations of the Crown to the Church and the Courts.

The growth of the Departments.

It is difficult, however, to leave the subject of the departments of Government without saying a few words, of a general character, as to the history of their growth and the almost accidental processes by which they have come to be what they are; and again, as to the methods by which a minister set to control, with no previous experience, the vast and complicated mechanism of one of these departments is supplied with the advice and information necessary to enable him to assume responsibility without disaster.

The history may be summarized briefly.

The King and his Household.

We begin with the King as the executive, surrounded by the great officers of the Household. These officers become, in time, Court functionaries: they yield in importance to a type of official who exists for the transaction of business rather than for the pomp of state.

The business official.

The business to be transacted is of three kinds, financial, judicial, secretarial; the collection of the King's revenue, the maintenance of the King's peace, the communication of the King's pleasure. The Exchequer, the Law Courts, and the Chancery represent the outcome of a gradual specializing of functions not in their origin clearly distinguishable. As time goes on the executive business of the country increases in bulk and becomes more diverse in character. Of this business a great part is transacted by the King's Council or Committees of the Council. From these beginnings we may trace the development of most of our existing depart-

ments, and watch their adaptation to the needs of state as they arose. The Great Seal, for the use of which the Chancellor is responsible, remains the most solemn form under which the King's pleasure can be expressed, but besides the Great Seal there are other methods of authenticating the intentions and acts of royalty, the Privy Seal, with its holder, sometimes one of the most important of the King's ministers, and the signets used by the King's Secretaries. The Chancellor remained a great officer of State, and a confidential adviser of the Crown, but he also acquired judicial duties incidental to his position as a member of the King's Council, and as the special exponent and dispenser of the King's grace. The Chancery is primarily an office, as the Chancellor is primarily an official; but the shortcomings of the Common Law made the Chancellor a judge, and we must go back to them to explain the fact that there is a Chancery Division of the High Court of Justice as well as a Crown Office in Chancery.

The communication of the King's pleasure.

The Chancellor.

While the Chancellor still retains in outline the duties which he had come to discharge in the sixteenth century, the Privy Seal is disused, and the Lord Privy Seal holds a sinecure office which may conveniently be employed to give Cabinet rank to a statesman who is needed in the counsels of the Crown and who is unwilling to undertake the work of a department. But the Secretaries have grown in importance, have multiplied in number, and have changed in character. From Tudor times they were members of the King's Council, responsible for the arrangement of its business, and expected to possess a knowledge of affairs, domestic and foreign; but the importance of the office varied with the character of the holder, and great names are infrequent among the Secretaries from the time of Cecil to that of Shrewsbury. So long as the work which is now transacted by departments was assigned to Committees of the Privy Council, a Secretary of State had no control over any one branch of Government business. But under the first two Hanoverian kings the importance of the Privy Council and its committees, already diminish-

The Privy Seal.

The Secretary of State.

ing, tended further to diminish; the Cabinet increased in power, and with it the Secretaries. Their work was still so distributed—into northern and southern departments[1]— that neither had full responsibility for foreign affairs, yet they could take an initiative and use an independence which they had lacked before. The geographical division of their work had, we may presume, very little effect on Bolingbroke when he worked with the Foreign Committee of the Council; and certainly would not have induced William Pitt to pay any regard to the province of diplomatic action assigned to his colleague. Yet, as matters stood before 1782, the work of the Secretaries of State was so arranged as to make friction possible and responsibility uncertain.

Northern and Southern.

The separation of duties effected in 1782, though it did not prevent a collision between ministers who were disposed to quarrel, was of great importance in the history of the departments of Government. Home and Foreign affairs are recognized for the first time as two distinct provinces of administration, and, though in theory the work of all Secretaries of State is interchangeable, from this time forth, as successive Secretaryships have been brought into existence, special functions have been assigned to each. They are recognized as departmental chiefs, not as channels for communicating the intentions of the King in Council.

Home and Foreign.

It is curious that this important change should not be recorded in the minutes of the Privy Council or in the departments themselves. The mode in which it took place appears only in the circular letter sent by Fox to our ministers abroad, in which he informs them that the King has been pleased to make a new arrangement in the departments 'by conferring that for Domestic affairs and the Colonies on the Earl of Shelburne and entrusting

[1] The lines of this distribution of work were laid down by the Stuart kings, though the provinces of each Secretary varied from time to time at the royal pleasure and were not mutually exclusive. In the eighteenth century they had become fixed. I am indebted to the kindness of Professor Firth for references to such a distribution in 1640, and in 1660. Cal. State Papers, Dom., 1629-40, p. 433. Hist. MSS. Comm. iv, Rep. App., p. 230.

me with the sole direction of the department of Foreign Affairs.'

Henceforward when a new Secretary of State was created he was created with a view to the discharge of specific duties, although the duties of all are interchangeable, and the title of the office is 'one of His Majesty's Principal Secretaries of State.' Thus in 1794 a third Secretary was made responsible for the general policy in respect of the army and the conduct of military operations abroad. Then in 1801 the care of the Colonies was entrusted to him. In 1855 the strange miscellany of departments which provided and controlled the army was swept together and formed the new province of the new Secretary of State for War, while the increasing work of the Colonial Office obtained the undivided attention of the Secretary of State for the Colonies. Later, in 1858, the Secretary of State for India stepped into the place of the East India Company.

The modern Secretariat.

Such and so various are the developments of the original machinery for communicating the King's pleasure to those whom it might concern.

Scotland and Ireland.

It seems somewhat of an anomaly that the ministers who are responsible for the domestic affairs of Scotland and Ireland should stop short at the title of Secretary, and that the Irish Secretary should be no more than Secretary to the Lord Lieutenant: but these are not necessarily Cabinet offices: Scotch business was administered for nearly 150 years, before 1885, by the Home Office with the assistance of the Lord Advocate, and it may happen from time to time that the Lord Lieutenant represents Irish affairs in the Cabinet to the exclusion of the Chief Secretary.

The Boards.

Still more anomalous is the statutory constitution of the Boards which, with the Secretariat, make up the bulk of the great administrative departments. The Board of Trade is still, and the Board of Education was until very lately, a Committee of the Privy Council. It is true that these Committees were seldom, if ever, known to meet, but their existence recalls the time when Committees of the Privy

Council transacted much of the business of Government, and it will be found that other Boards, when first constituted, took over some duties heretofore discharged by the Privy Council. But with the exception of the two which spring directly from Committees of Council, the Boards have taken the place of Commissioners appointed to discharge administrative duties, but without a political chief to represent and defend them in Parliament. Thus the Local Government Board in 1871 took the place of the Poor Law Board, which in its turn, in 1847, had assumed the duties of the Poor Law Commissioners, a body appointed in 1834 to administer the Poor Law, with no representative political chief. Duties have been added to those of the old Poor Law Board, largely created by statute, but in some cases transferred from the Home Office or the Privy Council; but the Board, as created by statute, does not discharge them. The Board of Works, in like manner, took over a portion of the duties of the Commissioners of the Woods, Forests, and Land Revenues of the Crown. The work of the Board of Agriculture, though partly transferred from the Privy Council and the Board of Trade, is to a great extent the work previously done by the Land Commissioners, who had in turn absorbed the duties of three earlier Commissions concerned respectively with the commutation of tithe, the enfranchisement of copyhold, and the enclosure of common lands.

Their origin.

Such is the origin of the administrative duties discharged by these Boards. Apart from the President of each Board their composition presents some curious features. The five Secretaries of State are members of every Board, and this may be a reminiscence of the early relations of the King's Secretaries to the Council and its Committees. In other respects their composition varies so much as to suggest that there was some purpose in the selection of members of each Board. On the other hand, it is so obviously unlikely that any of these Boards would ever meet that the choice of their members may have been an exercise of harmless ingenuity on the part of the draftsman. Thus, besides the Secretaries of State, the

Their composition.

First Lord of the Treasury is placed on the Boards of Agriculture, of Education, and of Trade; the Lord President of the Council on the first two of these and on the Local Government Board. The Chancellor of the Duchy and the Secretary for Scotland are on the Board of Agriculture; the Chancellor of the Exchequer on the Local Government Board and the Board of Education. The President of the Board of Trade is placed upon the Board of Works; while the Board of Trade—if it ever met—would be honoured by the presence of the Archbishop of Canterbury and the Speaker of the House of Commons.

Their purpose.

It is certainly very difficult to understand why these Boards have been thus constituted, unless it is to preserve some historical connexion with the Committees of the Privy Council. They cannot exist for the purpose of providing skilled advice for the political heads of departments. One can hardly suppose that the President of the Board of Education would wish to consult the Chancellor of the Exchequer on questions relating to the training of teachers, or that the Secretary of State for India could usefully advise the President of the Board of Agriculture on the subject of a muzzling order for dogs.

The Commissions of Treasury and Admiralty.

Very different from these Boards, and from one another, are the two Boards which now represent two great offices put into commission—the Treasury and the Admiralty. The Treasury Board, though it contains the Chancellor of the Exchequer, has little concern with finance. It is a means of providing a high office, that of First Commissioner of the Treasury, without departmental duties, for the Prime Minister or Leader of the House of Commons, while the junior Lordships give office and emolument to the party Whips. The Admiralty Board has been made the means of supplying expert advice to the civilian chief who is responsible for the well-being of the navy.

The provision of expert advice.

We may well take note here of the modes in which the political chiefs of departments obtain the expert advice which they necessarily require. In almost every case the minister who is invested with the responsibility for the

conduct of some portion of our executive government must find himself charged with the working of a machine whose action he has hitherto contemplated only from the outside. If he has any purpose except to keep the machine going, he is confronted with the difficulty of bringing his ideas as to how the machine ought to work into some correspondence with the facts,—the actual process of its working,—which he is now for the first time beginning to comprehend.

The three Councils.

This must be the case with every department, but the three to which a minister might come least prepared with the information necessary to the conduct of business would seem to be the Admiralty, the War Office, and the India Office. The post of Lord High Admiral has been in commission, with short intervals of revival, for more than 200 years, and the First Lord—the political chief—has been for many years past supplied with the professional advice which he needed by the Naval or Sea Lords. The Secretary of State for War has until recently enjoyed no such assistance. Mr. Cardwell, in the course of his great work of reorganization, complained frequently of his needs in this respect, but while the office of Commander-in-Chief remained in existence it stood in the way of any satisfactory scheme for the supply of professional advice to the Secretary of State. The difficulty was obvious. If the Commander-in-Chief was the sole professional adviser of the Secretary of State, his duties were heavier than one man could discharge: if he was associated, as an adviser, with others of his profession, his position as their military chief made it difficult for those others to advise on an equal footing. Within the last five years the abolition of the office of Commander-in-Chief has made it possible to constitute an Army Council, consisting of distinguished soldiers who represent the great branches of the military profession, and who, with the Financial Secretary as a civilian colleague, are bound to give their best advice to the Secretary of State.

The Admiralty Board.

The Army Council.

But these two Boards, the Commission of the Admiralty and the Army Council, are created, and might at any time be altered, re-constituted, or dissolved, by Letters

Patent[1]; their business, and the duties of their members, might be rearranged by Order in Council, or, to a large extent, by the directions of their political chief.

The Council of India.

The Council of India stands in a very different relation to the Secretary of State. It is a statutory body; its duties, its meetings, its procedure, are regulated by the Act of Parliament which transferred the government of India to the Crown. Doubtless Parliament intended to preserve, in some measure, the relations which had existed between the Directors of the East India Company and the President of the Board of Control. Hence every order or communication which is to be sent to India, or to be made in the United Kingdom, must, with limited exceptions, be submitted to the Council for discussion or an opportunity given for its perusal. And yet, although the Council of India occupies a position infinitely stronger in relation to its Parliamentary chief than the Admiralty Board or War Office Council, the position of the Secretary of State as responsible to his colleagues in the Cabinet, and to the nation in Parliament, for action taken, makes his Council little more than a consultative body with whom on certain occasions he is statutably bound to act, but whose conclusions he may always overrule. It is in fact impossible, under our constitutional system, to construct a department of Government in which power is shared between an extra-parliamentary Council and its political chief, who can say for what things he will, or will not, be answerable to Parliament.

Council of India a statutory body.

Power of political chief.

The Cabinet may decline to be responsible for the proposed action of the minister: then he must give way or retire; but so long as he enjoys the confidence of his colleagues in the Cabinet he can make his will prevail in his Council.

Distinctions between the three Councils.

But in two points there is a great difference between the Council of India and the Boards which advise the heads of the War Office and the Admiralty: firstly, the Secretary of State for India, if he overrules the opinion of his Council,

[1] If the Army Council were dissolved, the Secretary of State would remain to conduct, with his permanent staff, the business of his office. The dissolution of the Board of Admiralty would necessitate the appointment of a Lord High Admiral or the creation of some new method for

must record his reasons for so doing; and, secondly, the members of his Council have a statutory tenure for a term of years, depending, like that of the Judges, on good behaviour. The First Lord, or the Secretary of State for War, might, if he differed from his advisers, insist upon an alteration in the patent as a condition of his retaining office, and might address a recalcitrant member of his Council or Board, *mutatis mutandis*, in the language of Lord North to Fox: 'His Majesty has been pleased to order a new Commission of the Treasury to be made out, in which I do not observe your name.'

The method of providing expert assistance for a political chief and his department by means of a Council has not been followed except in the three departments which I have mentioned. The Consultative Committee of the Board of Education is a body wholly outside the Board. It has a statutory existence, and a statutory duty—that of framing regulations for a register of teachers—subject to the approval of the Board. Beyond this its duties are to consider and report upon such educational questions as the Board may refer to it. The members of the Committee, unlike those of the three Councils which we have been discussing, receive no emolument for their services. It is, in fact, a standing departmental committee, for use if required.

The Consultative Committee.

A department of Government can usually provide or obtain expert advice for the information of those who are concerned in its administration; but when the political chief of the department represents a great profession of which he is not a member, or where his responsibilities cover the vast range of the government of India, it is reasonable and right that he and those who work under him should possess a definitely constituted body of advisers who can supply the special experience needed, and are always available. The counsel thus given does not in any way diminish the responsibility of the minister, nor should it withdraw from the Cabinet questions which ought to be there decided. It is for the minister to determine what matters can be settled within his department, and what should come before the Cabinet. In the three offices which

Councils do not lessen ministerial responsibility.

we have been considering there must always be a class of business which, though not exceptional in importance, demands professional knowledge or special experience for its proper conduct: but questions arising in the Colonial Office or the Foreign Office which are outside the ordinary routine of business would probably be of an Imperial or international character, such as the Secretary of State would desire to bring before the Prime Minister and his colleagues. It is difficult to imagine a permanent Colonial Council which would not to some extent encroach upon the functions and diminish the responsibilities of the Cabinet.

Setting aside then the Admiralty, the War Office, and the India Office where the ordinary machinery of the Civil Service is supplemented by a Board or Council of advisers, the minister responsible for a department of Government must look to his permanent staff for information and advice, or for the suggestion of recourse to outside skilled opinion if such is required.

The Civil Service:

The quality of the assistance thus given to the minister, in other words the excellence of our Civil Service, rests on a threefold security. Our Civil Service is non-political, it is permanent, and it is kept at a high standard of ability and attainment.

is outside party;

The fact that the Civil Service is outside party politics enables the work of the service to be given impartially and freely to successive ministers holding different opinions and aiming at different ideals. It is only thus that the second characteristic of permanence can be assured: no minister could carry on business with a staff of officials some of whom were actively working, speaking, or writing in order to bring about the downfall of the party which he represented. Nor would these political distractions tend to promote efficiency in the service.

is permanent;

It has been pointed out by a recent writer on our constitution [1], that this permanence of office, so necessary to the excellence of the service, rests on custom and not on law, and that it is not the outcome of any exalted

[1] Lowell, Government of England, vol. i, p. 153.

standard of official duty, regarded as a public trust, but is the result of a national regard for vested interests which may seem strange to a citizen of the United States. There is no doubt in this country a feeling that when a man has been encouraged or allowed to spend time, money, and labour in qualifying himself for duties which he is discharging without reproach, he should not be displaced for no other cause than the desire of a party in the State to reward its friends at his expense. This feeling seems to be just in the abstract, and of practical utility as making for the stability of institutions. At any rate we have reason to be grateful to any national tendency or sentiment which has helped to make our Civil Service what it is.

is kept up to a high standard.

But this gratitude would be misplaced if the Service were not maintained at a high standard of ability and attainment. This has been secured by adopting competitive examination as the means of admission to the great majority of appointments in the Civil Service, a practice which has been followed for nearly forty years. In applying this test to the higher branches of the Service care has been taken to make the examination a test of general ability as distinguished from a test of immediate fitness for the technical work of a department, or a mere capacity for accumulating marks, and the result has been to fill our Civil Service with the best product of the Universities. Examination, especially when conducted on a large scale, always runs the risk of becoming mechanical, but it has the advantage of fixing and maintaining a standard. That the highest standard of attainment and efficiency is compatible with freedom from examination is shown at the Board of Education, where appointments are made by a simple process of selection: but examination may, for these purposes, be regarded as a corrective to the natural infirmity of the human judgment, or to occasional lapses from complete impartiality of choice: it has at any rate created a tradition of intellectual distinction as a feature of the Service.

We have seen what skilled assistance is available to a

Expert assistance available for Cabinet.

Minister placed in charge of a department of Government: it remains to ask what means exist for providing the Cabinet itself with the advice which it needs, as distinguished from the counsel which each member of the Cabinet may offer from the resources of his own office.

The Committee of Imperial Defence.

On questions of national security the Government has the advice of the Imperial Defence Committee, an institution which I have described elsewhere, which has grown out of the recommendations of the Hartington Commission of 1890, and which now occupies a permanent place in the Councils of the Crown [1].

The Parliamentary draftsmen.

For the *technique* of legislation the Parliamentary Counsel may be regarded as the advisers of the Government as a whole, as well as of the department specially interested in the contemplated measures. The policy which prompts and underlies any important legislation must be settled by the Cabinet, but the form in which that policy is to be shaped must be the work of the skilled draftsman, familiar with the Statute book, who knows the form in which the intentions of the Government may be most aptly and precisely expressed. It is not easy to say how far those intentions may not be modified when put into the definite phrasing of a Bill and shown in relation to other parts of the Statute book bearing on the same topics. The skill and knowledge of the draftsman may be brought to bear with startling effect on vague or ill-digested projects for legislation, and may influence not merely the form but the substance of the measures which he has to handle.

The Law Officers.

For legal advice on important issues there are the Law Officers of the Crown.

A Ministry of Justice: its component parts.

It has been observed by writers on our constitution that we have no Minister of Justice, and it is true that the functions of such a department are scattered among our institutions. The Home Secretary is generally responsible for the maintenance of order, for the exercise of the prerogative of mercy, and for the appointment of

[1] See infra, pp. 214-17, and Part i, p. 136.

Stipendiary and Police Magistrates and of Recorders. The Lord Chancellor nominates the Judges of the High Court, and appoints and can remove County Court Judges and Justices of the Peace. The Attorney-General regulates the conditions under which prosecutions should be undertaken by the Government and the action of the Public Prosecutor, and appears, with the Solicitor-General, in cases in which the interests of the Crown are concerned and in criminal trials of great importance. These duties of a Minister of Justice are, as it were, in Commission, and there is another, which falls upon the Law Officers of the Crown, namely, to advise the departments of Government, or the Government as a whole, on the legal aspect of political questions.

The advice of the Law Officers.

Every department has a legal adviser of its own, but is entitled to consult the Law Officers if it should require to do so. In many departments their opinion may only be required to interpret Statutes which it is the business of the department to administer, and then only in matters of great complexity or of a highly controversial character. But I am dealing here with matters which could not be settled without reference to the Cabinet, in which legal and political difficulties are intermingled, even to the extent of involving issues of peace and war: and here the advice of the Law Officers may determine the action of the Government. Such are questions which affect international relations, our relations with protected territories, and with foreign nations and the subjects of foreign powers in respect of such territories, or which concern the royal prerogative in the creation of jurisdiction or the cession of territory. On questions of such a character there must be a mass of recorded opinion, available to any Government, though not to the public[1]. These opinions are not available to the public partly because they may touch upon delicate international questions

[1] A collection of these opinions, on constitutional questions, was published by the late Mr. Forsyth in 1869. It is not likely that any similar publication, however interesting, would now be sanctioned or facilitated by the Departments of Government.

which remain still unsettled; but partly also because, in respect of them, the Law Officers stand to a department or to the Government as the permanent staff of a department to its political chief. The Minister or the Government takes, and must take, the whole responsibility for action; and this action must be justified or condemned by its results. It may be the misfortune of the Minister that he was offered bad advice, and took it, but he cannot defend himself by shifting the blame on to his departmental advisers. The loyal service of the permanent staff demands in its turn complete assumption of responsibility by the political chief.

I have endeavoured in these pages to sketch the character of the great departments of Government, and of the sources upon which their political chiefs or the Cabinet as a whole can rely for information and advice, because it is often difficult to understand how party government—which necessarily means to a great extent government by amateurs—is compatible with efficient government. The efficiency depends on the excellence of the Civil Service, and on the public spirit of that service and of all those who in any capacity are called on to assist the Ministers of the Crown. But this is not very easy of explanation. An eminent Civil Servant once said to me when trying to make me understand the working of his department, 'These things are like tennis; you cannot understand the rules until you have played the game.' I appreciated at the time the profound truth of the remark: and I have since realized that it is possible to have played the game and yet to find it difficult to make the rules intelligible.

THE DOMINIONS AND DEPENDENCIES OF THE CROWN

THIS chapter must cover a wide field. In official documents the King is described as—

> Edward, by the Grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King. Defender of the Faith. Emperor of India[1].

And yet these words hardly describe the compass of his sovereignty. In this chapter I wish to deal with the relations of the central executive to all those territories which acknowledge the rule of the King, whether or no they fall under the title which I have just set forth.

The United Kingdom.

Thus I must speak of the United Kingdom and its component parts, of the Home Office as the central executive for domestic affairs, and of the Local Government Board as connecting the forms and areas of local self-government with the central power.

The adjacent islands.

Next I must note the constitutions of the adjacent islands, and the mode in which, mainly through the Home Office, they are connected with the executive government of the country.

The Colonies.

Thirdly will fall to be considered the royal prerogative in its relation to the Colonies, the mode of its expression through the Colonial Office, and the limitations imposed upon its exercise by the constitutions of the various Colonies.

India.

Fourthly will come the India Office, its relation to the Government of India, and the independent native States.

Miscellaneous possessions.

Lastly, I must note some miscellaneous possessions of the Crown, and the spheres of influence which bring us to the borderland of our foreign relations.

[1] For the royal titles see 39 Vict. c. 10, and 1 Ed. VII, c. 15.

Section I

The United Kingdom

§ 1. *England and Wales.*

England and Wales have been one kingdom for so long a time that to consider the process of union between the two seems almost as remote as an inquiry into the welding together of Saxon England under pressure of Danish invasion and Norman rule. But some trace of this gradual assimilation of institutions is still comparatively modern and needs a few words of explanation.

Edward I and Wales.

Edward I annexed the territories taken from Llewellyn. He announced this in the Statutum Walliae (1284), which introduced the shire organization into these territories and also into his own domains in Wales. Out of the first he constituted Anglesey, Carnarvonshire, and Merionethshire; out of the second, Flintshire, Cardiganshire, and Carmarthenshire. With the exception of Anglesey, these shires did not correspond in area with the modern counties of the same name. Flint was cut out of the county palatine of Chester, which, together with the lordships of Carmarthen and Cardigan, had been granted to Edward by his father in his lifetime. Provision was made for the administration of royal justice over these shires, but they were not subject to the Courts at Westminster.

The Marcher Lords.

Outside of these territories, and on the south, lay the county palatine of Pembroke, and the lordship of Glamorgan, both organized on the shire system, but having those *jura regalia* which constituted them palatinates. On the east, right up to and including some parts of Gloucester, Hereford, and Shropshire, lay the marcher lordships. These lordships, the outcome of conquest from the Welsh by English lords and knights, though nominally held by the King, enjoyed a large measure of independence. They played a considerable part in the mediaeval history of England[1], and from the extent of their jurisdictions were able to subject the dwellers on the land to considerable

[1] Tout, Historical Essays by members of Owens College, p. 79.

hardships. This evil was dealt with 200 years later by the establishment of the Court of the 'President and Council of Wales and the Marches' with a jurisdiction corresponding in some measure to that of the Star Chamber.

This Court, which exercised a useful and needed severity in the fifteenth and beginning of the sixteenth century, was confirmed in its jurisdiction by Henry VIII[1], survived the Star Chamber and the Commonwealth, and indeed the necessity for its existence, and was abolished by 1 Will. & Mary, sec. i. c. 2.

Henry VIII and Wales.

But Henry VIII recognized that the evils arising from the lawlessness of the border needed other remedies than these. It was necessary to bring the marcher lordships into the shire system common to the rest of England. By this time Pembroke and Glamorgan had come to be regarded as shires, with the shire organization, and are styled, together with those constituted by the Statutum Walliae, as 'shires of long and ancient time.'

In 1535 the marcher lordships were grouped into five new counties or added to existing counties. Thus were constituted Monmouth, Brecon, Radnor, Montgomery, and Denbigh. Monmouth was treated as a part of England in so far as it was brought under the jurisdiction of the Courts at Westminster, and was thenceforth to be represented by two knights of the shire for the county and one burgess for the borough of Monmouth.

The twelve counties.

The twelve counties which now constituted Wales were ordained 'to stand and continue for ever from henceforth incorporated, united, and annexed to and with this realm of England[2].' Each county was to be represented by a single knight of the shire, and one burgess was to represent the shire town of each county except Merioneth. The rules of English law were to prevail, except in the case of such Welsh customs as the King in Council might approve[3].

A later Act[4] made fuller provision for the administra-

[1] 34 & 35 Hen. VIII, c. 26. [2] 27 Hen. VIII, c. 26, s. 1.

[3] For an account of the introduction of the shire system into Wales see Tout, 'The Welsh Shires,' Y Cymmrodor, ix. 201.

[4] 34 & 35 Hen. VIII, c. 26.

The Courts.

tion of justice. Four circuits were formed, covering the whole area of the Principality, and four justices were to sit, with the Royal Commission, twice a year in each county, exercising a jurisdiction as large as that of the King's Bench and Common Pleas at Westminster.

The organization of justice was provided for on the lines of an English county; but the Courts above referred to, called the King's Great Sessions, and the Court of the President and Council of Wales and the Marches, were outside and independent of the jurisdiction of the Westminster Courts[1].

These Courts, except that of the President and Council, which was abolished in 1688, transacted the judicial business of Wales, with some modifications of procedure, until 1830[2], when they were abolished, and the Principality came under the jurisdiction of the Courts of Westminster.

In 1747 it was enacted that the mention of England in an Act of Parliament should be taken to include Wales[3].

§ 2. *Scotland.*

The union of the Crowns.

The relations of Scotland with England are settled by the Act of Union, the provisions of which have been but slightly affected by subsequent legislation. Such a union was inevitable from the time that the two kingdoms were placed in the same allegiance by the accession of James VI of Scotland to the throne. Very early in the reign of James it was held that Scotchmen born after James had become King of England were entitled to the rights and privileges of English subjects, being born in allegiance to the English King. The Crown of Scotland followed throughout the seventeenth century the vicissitudes of the English Crown. The Scotch Parliament in 1661 declared the hereditary right of Charles II, and in 1689 followed the English Bill of rights with the Scotch claim of right,

[1] 34 & 35 Hen. VIII, c. 26, modified by 18 Eliz., c. 8, and 13 Geo. III, c. 51.

[2] For an account of these Courts and their abolition see Rhys and Brynmor Jones, The Welsh People, pp. 386–92.

[3] 20 Geo. II, c. 42, § 3.

and the offer of the Scotch Crown to the King and Queen of England[1]. As the inconvenience of separate Parliaments and the risks of a divided succession made it plain that union was inevitable, each Parliament tried to force the hand of the other. The Scotch in 1704 passed the Act of Security providing that, unless on the death of Anne there were heirs of her body, or a successor was appointed by her in conjunction with the Estates, then in such case the Estates should appoint a successor. The person so appointed was not to be successor to the throne of England unless meantime provision was made for the independence of Scotland and its freedom from English influence[2].

The union of the nations.

The English Parliament retorted next year by an Act which made Scotchmen aliens and prohibited the importation of Scotch cattle, coals, or linen after Christmas Day, 1705.

The Scotch had most to lose by holding out, and before this last Act could take effect the terms of union were so far settled that the English Parliament repealed the threatening clauses.

The United Kingdom of Great Britain was the creation of the Treaty of Union.

From 1602 until 1707 England and Scotland had been two communities in allegiance to a King who held his Crown by two distinct titles, governed through two distinct executive bodies, and taxed and legislated through two distinct Parliaments. In 1707 the Act of Union was passed[3]. Its main provisions secured that England and Scotland should be one kingdom, and the succession to the Crown the same for both countries, that they should have one Parliament, and that except as otherwise agreed the rights of citizenship should be the same for all.

Terms of union.

The representation and taxation of the two countries

[1] Acts of the Parliament of Scotland, ix. 38.

[2] Acts of the Parliament of Scotland, xi. 136. The royal assent had been refused to this Bill in 1703.

[3] 6 Anne, c. 11. The Acts of Ratification passed in Scotland on the 16th of January, in England on the 6th of March, 1707.

was settled in proportion to their respective numbers and wealth; the ecclesiastical arrangements of the two countries were carefully maintained as then existing. Scotland moreover retained her rules of private law and the constitution and procedure of her Courts. The judgments of the Court of Teinds and the Court of Session[1] from which appeal had lain to the Parliament of Scotland were held, though this was not expressly stated in 6 Anne, c. 11, to be subject to appeal to the House of Lords. A new Court of Exchequer was constituted in Scotland for revenue purposes by 6 Anne, c. 53; from this too error lay to the House of Lords.

As to Private Law.

It remains to consider the relations of Scotland since the Union to the legislative, executive, and judicial machinery of the constitution. The representation of Scotland in the Parliament of the United Kingdom is a matter which I have dealt with elsewhere[2]. Like the rest of the United Kingdom, Scotland is not merely subject, in common with the whole Empire, to the sovereignty of Parliament, but Acts of Parliament are of force in Scotland unless their operation is limited by express words or necessary implication. The attempt made in the Acts of Union with Scotland and Ireland to frame fundamental laws which no subsequent Parliament might alter is noticed elsewhere[3].

Representation.

The Executive Government of Scotland was for some years after the Union conducted by a Secretary of State for Scotland[4]. This office was not continuously filled, but existed, except at short intervals, until 1746. On the rearrangement of the business of the Secretariat in 1782, the Home Office took over the formal conduct of Scotch affairs, the Home Secretary being advised in these matters

The Executive.

[1] The Court of Session is the supreme civil Court of Scotland. The Court of Teinds was a body of Commissioners, since absorbed into the Court of Session, for dealing with ecclesiastical endowment by way of tithe, readjusting its distribution in the interests of the Church, making new parishes, or altering the boundaries of existing parishes.

[2] Vol. i, Parliament, ch. v. s. i.

[3] Ibid., ch. iii.

[4] Stanhope, Hist. of England, ii. 69. For a list of such Secretaries see Haydn, Book of Dignities, 502 (ed. 2).

by the Lord Advocate, a law officer corresponding to the English Attorney-General but discharging for the purpose of the domestic business of Scotland the duties of an Under-Secretary for the Home Department. In 1885 a separate department was created for the conduct of Scotch business, and a Secretary for Scotland appointed who is not a Secretary of State nor necessarily a member of the Cabinet. Almost all the business which was before transacted in the Home Office, through the Secretary of State advised by the Lord Advocate, is now assigned to the new department[1].

In judicial matters Scotland retains her own law, her own Courts with their procedure. The jurisdiction of the House of Lords, in appeal from the Courts of Teinds and of Session, which rested on analogy with the practice before the Union, is now based on the Appellate Jurisdiction Act, 1876. The Courts.

§ 3. *Ireland.*

It is necessary to be brief in noticing the relations of England, or later of Great Britain, to Ireland before the Act of Union in 1801.

Henry II and John endeavoured, so far as their conquest and settlement of Ireland allowed, to impart the English law and judicial organization to their Irish subjects. Irish Parliaments came into existence early in the fourteenth century, summoned in the same form as English Parliaments by the deputy of the English Crown. In 1495 was passed, by one of these, the celebrated Statute called after the deputy of the time 'Poyning's Law[2].' In two important points it altered the relations of Ireland to the English Crown. It brought into force in Ireland all English statutes existing at the date of its enactment. It limited the meetings and the legislative powers of the Irish Parliament. Henceforth the Parliament met only when the King's deputy or lieutenant certified the causes Conquest and settlement. Poyning's Law.

[1] See vol. ii, part i, p. 170.

[2] 10 Henry VII, c. 4, s. 10; see Irish Statutes, Revised Edition, Appendix, p. 761.

of summons under the Great Seal of Ireland and obtained licence for holding a Parliament; while the legislative powers of Parliaments so summoned were limited to the acceptance or rejection of bills already approved by the Crown in Council.

The relations of the Irish Parliament to the Crown, thus established by Poyning's Act, were, in the reign of Mary [1], further explained: after the Irish Parliament had been summoned, other proposed enactments might be certified by the Lord Lieutenant and approved by the Crown in Council: the Parliament might then 'pass and agree upon such Acts and no other.' With these limited powers it occasionally showed signs of independence, as by the rejection of a money Bill in 1692, and it acquired a modified power of initiation by the practice of submitting to the Irish Privy Council the heads of Bills which it desired to see passed: these were sent, or not sent, to the King at the option of the Privy Council; and if returned were submitted to the Irish Parliament in the form approved by the Crown in Council, to be accepted or rejected without amendment. Thus the Parliament obtained a power of suggesting legislation somewhat similar to that of the mediaeval English Parliament, and when, after the Revolution, the hereditary revenues of Ireland no longer met the expenses of government, the Irish Parliament was of necessity more frequently summoned, and its importance proportionately increased.

The Irish Parliament controlled by the Crown in Council.

So far the restraints upon the Irish Parliament had come from the prerogative of the Crown. From the time of the Revolution its legislative independence was threatened by the claims put forward by the English Parliament. In 1720 an Act was passed [2] declaring the powers of the Crown in Parliament to make laws to bind the people and kingdom of Ireland, and the same Act denied the appellate jurisdiction which the Irish House of Lords had exercised, and asserted it for the English House of Lords.

And by the Legislative supremacy of the British Parliament.

The duration of Irish Parliaments, which had been limited

[1] 3 & 4 P. & M. c. 4; see Irish Statutes, Revised Ed., Appendix, p. 776.

[2] 6 George I, c. 5; and see Lecky, Hist. of England in the Eighteenth Century, vol. ii, p. 225.

only by the prerogative of dissolution or demise of the Crown, was by the Octennial Act in 1768 fixed at eight years, unless either of the two causes above mentioned should operate to bring about a speedier dissolution. An increased freedom of action in dealing with money Bills was only one of many signs of impatience at the legislative subordination of Ireland to England. A perpetual Mutiny Act, passed at the instance of the English ministers, helped to bring to maturity the demand for the independence of the Irish Parliament.

Legislative independence granted in 1782.

In 1782 this independence was obtained. The British Parliament passed Resolutions one of which pronounced in favour of the repeal of the Declaratory Act; while another was to the effect that an address should be presented to the King asking him to take such measures as would place the connexion of the two kingdoms on a basis of mutual consent. In pursuance of these resolutions the Declaratory Act was repealed[1]; the right to legislate for Ireland as well as the right asserted for the House of Lords as a Court of error and appeal from the Irish Courts was thereby renounced. The King gave his assent to various Irish Bills repealing the perpetual Mutiny Act, and removing the executive restrictions upon Irish legislation. Henceforth the royal veto was to be the only restraint on the action of the Irish, as on the British Parliament. In the following year, for the more complete assurance of the Irish in their new rights, the British Parliament passed an Act of Renunciation[2], by which the legislative and judicial independence of the Irish Parliament and the Irish Courts was recognized so fully and explicitly as to satisfy every demand which Ireland had made on the subject.

Its working.

It is important to understand the working of the constitution under this phase of the relations between Great Britain and Ireland. The King of Great Britain was the King of Ireland. He was represented in Ireland by a Lord Lieutenant who, like the representative of the Crown in a self-governing colony, chose the Irish Executive. But although the Irish Parliament enjoyed a legislative inde-

[1] 22 Geo. III, c. 53. [2] 23 Geo. III, c. 28.

The Irish Government.

pendence nominally larger than that of the self-governing colonies of to-day, Ireland had not their measure of self-government. The royal veto was a reality, and the responsibility of ministers to Parliament was not recognized. Great offices in the Irish Government had long been treated as sinecures which formed part of the patronage of the First Lord of the Treasury in England: it was not until 1793 that a Treasury Board responsible to the Irish Parliament was even contemplated[1]; nor was there any recognized impropriety in the tenure of high office by a vehement opponent of an important Government measure[2].

The fact was that the Irish Executive represented English party politics. In the language of Mr. Lecky, 'Ministerial power was mainly in the hands of the Lord Lieutenant and his Chief Secretary, and this latter functionary led the House of Commons, introduced, for the most part, Government business, and filled in Ireland a position at least as important as that of a Prime Minister in England[3].'

The Irish Parliament.

The Irish House of Commons was, really, less representative of the Irish people than was the English House of Commons of the English people before 1832. No great desire was expressed for a responsible executive. When Lord Fitzwilliam carried out the official changes and dismissals which led to his recall in 1794, these changes were not made in consequence of votes given or representations made by the Irish House of Commons. They were regarded as indicating a change of policy on the part of the English Government.

The Chief Secretary to the Lord Lieutenant, who sat in the Irish House of Commons and introduced Government business, was, like the Viceroy, representative of the party in power in England. If the Irish Parliament had been really representative, and had insisted upon the responsibility of the executive, the situation might easily have

The Irish Executive and

[1] Lecky, History of England in the Eighteenth Century, vi. 565.
[2] Ibid., vi. 599. [3] Ibid., vi. 318.

become impossible, because it would be difficult to suppose that the balance of parties and the currents of political opinion would have worked in correspondence in the two countries. English party politics.

The governor of a self-governing colony is a neutral person, a constitutional king: the Viceroy and Chief Secretary alike were members, and practically nominees, of the party in power in England. Thus it might have happened that the Viceroy who was charged with the selection of ministers in Ireland, and the Chief Secretary who was charged with the conduct of Government business for Ireland, might be summoned away from their duties by a change in the balance of English parties. Those who took their place would certainly be of different political prepossessions.

And this dependence of the Viceroy and his Secretary on English party politics did not affect merely the choice of the executive. The royal veto on Irish Bills was a reality, not, as in England, a thing of the past. It would be exercised on the advice of the Viceroy, and one may reasonably suppose that the advice of two successive Viceroys of wholly different political views might be widely divergent on the merits of the same topic of legislation.

Again, the enemies of the King of Great Britain would be the enemies of the King of Ireland, but the foreign policy of the King of the two countries, the declaration of war or the maintenance of peace, would certainly be determined by the advice of his British ministers. The views of his Irish Executive would reach him, if at all, through the Viceroy, himself a member of the British ministry; the views of the British ministers would carry all the weight that would be due to the comparative importance of Great Britain and Ireland; they would be communicated directly, while the opinions of the Irish Executive would pass through an intermediary, perhaps unfriendly to their tenor. So the foreign policy of Ireland would be shaped by the British ministry whether the Irish would or no. But although a declaration of war Possible difficulties.

by the King of the two countries might bring Ireland into hostilities with a power against whom she had no ill will, the Irish Parliament could effectively cripple the military operations of England, by refusing to vote money and men, or by requiring of its executive a policy adverse to that of its neighbour. A collision between the Irish Executive responsible to the Irish Parliament, and the Viceroy and Chief Secretary responsible to the English Parliament, would under such circumstances have been inevitable.

The relations between the two countries could, in truth, only work well by the exercise of great public spirit and mutual forbearance on both sides, or by the existence of indifference or corruption on one. Fortunately for the well-being of the two countries there was no change in the English ministry during seventeen years out of the nineteen that Ireland enjoyed this practical independence of the English Government.

Ireland and Scotland before the Unions.

The relation of Ireland to Great Britain at the time of the Act of Union presented some such difficulties as did the relation of England to Scotland at the commencement of the eighteenth century. Ireland and Great Britain were two independent countries under the same King, but the difficulties in the case of Ireland were greater than in that of Scotland, because the supreme executive in Ireland was dependent on the action of party government in England, and because differences of race and religion caused a risk of disturbance in the smaller kingdom which might necessitate the use of force by the larger kingdom.

It is enough, however, to try and exhibit the working of the two constitutions. I do not wish to pronounce on the merits or demerits of the scheme of 1782–3, or of the policy and procedure of Pitt in bringing about the Act of Union in 1801.

The Union,

The terms of this Union, embodied in Acts of the two Parliaments[1], provided that the succession to the Crown should be the same, and that there should be one Parlia-

[1] 39 & 40 Geo. III, c. 67, and Irish Statutes, Revised Ed., 40 Geo. III, c. 38.

ment for the two countries. The amount of Irish representation in the Lords and Commons was determined: the subjects of the two countries were to possess equal rights as to trade, navigation, and treaties with foreign powers. The Irish laws and Irish Courts were unaffected by the change, except that from the Irish Courts an appeal lay henceforth to the House of Lords of the United Kingdom.

Legislative.

The relations of Ireland to the Parliament of the United Kingdom as regards representation have been elsewhere described[1]; as regards subordination it may be said that Ireland is bound by a public statute unless expressly or by natural implication excepted.

Executive.

Its relations to the executive are neither so simple nor so satisfactory. The King is represented in Ireland by a Viceroy or Lord Lieutenant, who is the chief of the executive; in formal matters the pleasure of the Crown is signified to him through the Secretary of State for the Home Department.

Irish administration.

The Lord Lieutenant represents the Crown, but the Chief Secretary is the minister mainly responsible to Parliament for the conduct of Irish administration. This office is one of increasing importance, since the holder is in everything but name and rank a Secretary of State for Ireland. The administration of public business in Ireland is conducted by a number of Boards, of which comparatively few are under the full and direct control of the Irish Government of the day[2]. Nevertheless, the Chief Secretary may be called to explain or justify the action of these Boards, if questioned in Parliament. The Lord Lieutenant has large prerogatives, and his immunity from action in the Courts of the country for any act done in his official capacity is larger than that of a Colonial Governor[3].

[1] Vol. i, Parliament, pp. 121, 122, 181, 210.

[2] For a description of these Boards see the speech of Mr. Birrell on May 7, 1907, in introducing the Irish Council Bill. Hansard, 4th Series, vol. clxxiv, p. 83.

[3] The legal immunities of the Lord Lieutenant will be treated elsewhere. It is enough here to refer to the case of *Sullivan* v. *Spencer* [6 Irish Reports, C. L. 176], and to invite comparison between that case and *Musgrave* v. *Pulido*. 6 App. Ca. 102.

But the reality of power tends to pass to the man who is responsible to the House of Commons for the exercise of these prerogatives, and the office of Lord Lieutenant, with its costly and dignified surroundings, becomes more and more a survival of a time when Ireland was not as near to us in point of communication, nor as closely connected in point of constitution, as it is at the present day.

The Irish Courts are constituted on the model of the English Courts, and administer the English municipal law.

Central government in England.

So far we have been concerned with the relations to one another of the different parts of the United Kingdom. Before passing to the relations of the central government with the adjacent islands, with India and the Colonies, we must consider the departments which are mainly responsible for order and good government at home. These are the Home Office and the Local Government Board.

The Home Secretary may be said to be mainly responsible for the communication of the King's pleasure in matters arising within the United Kingdom and the adjacent islands, and for the maintenance of internal peace, order, and well-being within those limits.

The Local Government Board is mainly responsible for the grant of powers of self-government and the control of their exercise in various matters concerning public health, public convenience, and the administration of relief to the poor.

§ 4. *The Home Office.*

The Home Office: its history;

When, in 1782, the old division of duties among the Secretaries of State was discontinued[1], and the Colonial Secretaryship was abolished, much of the work of the Southern Department and all the work of the Colonies was transferred to the Home Office. Between 1782 and 1794 the Home Secretary transacted all the business of a Secretary of State which was not concerned with our foreign relations, and this business included, besides the superintendence of our Colonies, all communications between the

[1] See The Crown, part i, p. 165.

Home Government and the Irish—and these between 1782 and the Union were frequent and important—all communications with the War Departments relating to the movements of troops at home and abroad.

In 1794 the Home Office was relieved of much business connected with the War Departments, and of colonial business in 1801; the Act of Union with Ireland brought the Chief Secretary to the Lord Lieutenant into closer communication with the Cabinet, and through his office in London is transacted all Irish business, except some matters of a formal character which still pass through the Home Office.

It would seem as though a department which had been relieved of so much work must now be lightly burdened; such was the impression of the Whig economists when the close of the Napoleonic wars reduced the work of the War Department, when the Act of Union had lightened the labours of the Home Office, and when our Colonies were still few and small[1].

its duties.

But though the Home Office may not have been an exacting department in 1816, the State has been very active in the last ninety years, and much of this activity has been exercised at the expense of the Home Office. The statutes which throw duties on the Home Secretary in respect of the good order, security, and general well-being of the community would, if I were to set them forth, appal the reader as much as Glanvil was appalled by the *confusa multitudo* of the customary rules of law in the twelfth century.

The Home Secretary.

The Interpretation of Terms Act, 1889, enacts that in every Statute the expression 'Secretary of State' shall mean one of 'His Majesty's Principal Secretaries of State for the time being'; and we are thereby reminded that there is no duty of any one Secretary of State which, unless Parliament enacts otherwise, may not be discharged by any other Secretary of State. Nevertheless, the functions of the departments are practically quite distinct, nor would any one suppose that the Home Secretary was the

[1] Hansard, 1st series, vol. xxxiii, p. 893, debate on Mr. Tierney's motion respecting the offices of secretaries of state, April 3, 1816.

Secretary of State referred to in a Military Lands Act, or that the Secretary of State for India was the officer on whom powers were conferred by a Factory Act.

He is the Secretary of State *par excellence.*

But, in addition to the statutory duties imposed on him, the Home Secretary has customary duties as being in an especial manner His Majesty's principal Secretary of State, and these duties have a certain historical interest.

Division of business.

The business of the Home Office is, for the purposes of the department, arranged in three divisions, each superintended by a principal clerk; these divisions are respectively called the Criminal, the Domestic, and the Industrial and Parliamentary[1]. The last two admit of being grouped together, but I think that the convenience of the reader may be better suited by a different arrangement. So I will divide the duties of the Secretary of State as follows:—

(*a*) Communications passing between Crown and subject; or, one may say, the expression of the King's pleasure.

(*b*) Enforcement of public order; or, one may say, the maintenance of the King's peace.

(*c*) Enforcement of rules made for the internal well-being of the community.

(*a*) *Communications between Crown and Subject.*

The Home Secretary:

Whenever the King's pleasure has to be taken, or communicated to an individual or a department, unless the matter is specially appropriate to Foreign, Colonial, Military, or Indian affairs, the Home Secretary is the proper medium of communication. Although each of the Secretaries is capable in law of discharging any one of the functions of the other, yet the Home Secretary is the first in precedence, and his duties bring him into a more immediate and personal relation to the Crown than do those of his colleagues.

communicates King's pleasure;

He is the successor and representative of the King's Secretary as that officer appears to us in the sixteenth century, the Minister through whom the King was addressed, who

[1] There are, besides the permanent Under-Secretary of State, three permanent Assistant Under-Secretaries, one of whom is described as the 'legal assistant' and superintends the criminal business of the Office.

kept the signet and the seal used for the King's private letters, and authenticated the sign manual by his signature. Therefore the Home Secretary has, besides the general duties of his department, much to do that is formal and ceremonial in its character. He notifies to certain great local officials[1] certain matters of State intelligence, such as declarations of war, treaties of peace, births and deaths in the royal family. When the King takes part in a ceremonial he ascertains the royal pleasure as to arrangements, is responsible for their conduct, and must be present.

and State intelligence.

He receives addresses and petitions which are addressed to the King in person, as distinct from the King in Council, he arranges for their reception, their answer, or their reference by the King's command to the department to which they relate; but whether it be a private individual that addresses the Sovereign, or a great corporation such as the City of London, or the University of Oxford, or whether it be one or both of the Houses of Parliament, the matter passes through the hands of the Home Secretary. Besides these miscellaneous duties, in the great majority of cases in which the King's pleasure has to be expressed formally under the sign manual, it is the duty of the Home Secretary to cause the document to be prepared for the royal signature, and afterwards to countersign it. Such documents are sometimes complete, for the purpose which they have to serve, when the royal signature has been affixed and countersigned; in other cases they only authorize the preparation of documents which must pass under the Great Seal.

Countersignature of sign manual.

Where a sign manual warrant is an authority for affixing the Great Seal, it must be countersigned either by the Chancellor, one of the Secretaries of State, or two Lords Commissioners of the Treasury, and this duty of countersignature falls most often upon the Home Secretary. Thus in the creation of a Peer the Prime Minister informs the

Illustrations.

[1] The Lord Mayor of London, the Lord Lieutenant of Ireland, the Lieutenant-Governors of Guernsey, Jersey, and the Isle of Man, the Lord President of the Court of Session, the Lord Justice Clerk, the Lord Advocate for Scotland.

Home Secretary of the intention of the Crown; a warrant for the sign manual is prepared and submitted by the Home Secretary to the King, and having been countersigned by him is returned to the Crown Office as authority for the preparation of the letters patent by which the Peerage is conferred, and the affixing to them of the Great Seal. These are then sent through the Home Office to the newly-created Peer.

I have in an earlier chapter adverted to the distinction between documents which have to pass under the Great Seal and those which are completed by the sign manual countersigned by a Secretary of State. It is enough here to note the vast amount of work of this nature, some purely ministerial, some discretionary in its character, which passes through the Home Office. And further, it should be borne in mind that there is a reason for casting all this work upon the Home Secretary. The reason is that the King's authority is required for a great number of warrants and letters patent, making appointments, conferring honours, issuing orders, or granting licences and dispensations; that the proper channel through which this authority is communicated is one of His Majesty's Principal Secretaries of State, and that since the greater number of these matters are not appropriate to the other departments of the Secretariat—Foreign or Colonial, Indian or Military—the Secretary of State for the Home Department is the obvious inheritor of the ancient duties of the King's Secretary [1].

Reasons for his miscellaneous duties.

For this reason the Home Secretary, among his miscellaneous duties, is the means of communication between the King and the Church [2], for the purpose of making appoint-

Duty of Home Secretary in Church matters.

[1] The form in which the Secretary of State addresses the Sovereign in communicating these matters runs thus:—

Mr. Secretary —— presents his humble duty to your Majesty, and in transmitting the accompanying documents for your Majesty's signature humbly begs leave to explain, &c.

[2] If the Home Secretary should not be a member of the Church of England these duties are discharged by the First Lord of the Treasury. See speech of Mr. Secretary Matthews. Hansard, ccxlix, p. 1734.

ments to benefices vested in the Crown, for setting in motion the Houses of Convocation, and confining their legislative action within certain limits; in matters of administration he advises the King, and communicates his pleasure to the Lieutenant-Governors of the Channel Islands and the Isle of Man.

As to the adjacent Islands.

In the peculiar form of action by which the subject may sue the Crown, or, what is the same thing, a department of government, the right to sue is technically dependent on the King's grace. The cause of action is stated in a petition which is lodged with the Home Secretary, who takes the opinion of the Attorney-General, and consults any department of State that may be affected by the claim. If the opinion of the Attorney-General is favourable, the petition is submitted for royal endorsement of the fiat 'let right be done'; the petition is then sent to the department concerned, that a plea or answer may be returned in twenty-eight days, and the subsequent proceedings follow the course of an ordinary civil action.

As to petitions of Right.

(*b*) *The maintenance of the King's peace.*

The Home Secretary is responsible for peace and good order throughout the land, and this responsibility is discharged in various ways:—

(1) He exercises a control over the elements of possible disorder.

(2) He supervises, more or less closely, the police force of counties and towns.

(3) He has to do with the machinery for the administration of criminal justice.

(4) He controls prisons and other places for the detention of convicted persons, or of unconvicted persons charged with crime.

(5) If justice demands that a sentence should be annulled or commuted he advises the King in the exercise of the prerogative of mercy.

(1) The naturalization of aliens may seem but remotely connected with the duties of the Home Secretary in the

He admits to citizenship.

maintenance of the peace, but the Naturalization Act[1] gives to him an absolute discretion, and he may, 'with or without assigning any reason, give or withhold a certificate as he thinks most conducive to the public good.' He is therefore entrusted with the power of determining whether or no a candidate for citizenship is likely to prove a good citizen.

He is further charged with ensuring the observance of the Foreign Enlistment Act[2], and of the Act[3] which confers privileges upon foreign ambassadors and their servants: he preserves, in these respects, the amicable relations of the subjects of the King with those of foreign powers.

His control of secret service money.

The Home Secretary, with the other Secretaries of State and the First Lord of the Admiralty, is entitled to demand a portion of the sum available (£50,000) for secret service *within the kingdom*. The right and the duty, if occasion

Post Office.

requires, of *detaining and opening letters in the Post Office* rests in Great Britain upon the Home Secretary, in Ireland upon the Lord Lieutenant. This power, which extends to telegraphic communications, is occasionally, though not fre-

Telegraph.

quently, used[4]. He may for State purposes control the use of the Telegraph[5]; he may obtain, without showing cause, the issue of a writ *ne exeat regno* to keep a subject within the realm; in cases of anticipated disorder he may approve or enforce provisions for the appointment of special

[1] 33 & 34 Vict. c. 14. [2] 33 & 34 Vict. c. 90.

[3] 7 Anne, c. 12, s. 6.

[4] 7 Will. IV, & 1 Vict. c. 36, extended to telegrams by 32 & 33 Vict. c. 73, s. 23. For instances of the use of this power see Parker, Life and Letters of Sir James Graham, vol. i, ch. xiv, and the Report of a Committee of the House of Commons which sat to inquire into precedents for the action of Sir James Graham in 1844. In this Report (vol. xiv of Parliamentary Papers for 1844) the whole history of the subject is set forth, and it is interesting to note that, in contrast to the indignation excited by the exercise of this power in 1844, the Commonwealth Parliament in 1657 considered that one advantage derived from the existence of a Post Office was the opportunity for discovering dangerous designs against the welfare of the Commonwealth when communicated by letter.

The power was exercised by Sir William Harcourt in 1882. See Hansard, cclxvii. 294.

[5] 26 & 27 Vict. c. 112.

constables[1], and can call in the aid of the Admiralty and War Office when necessary for the maintenance of the peace.

Again, though the Secretary of State is not, as such, a magistrate *ex officio*[2], nor has a general power of commitment, it seems settled that he may commit persons charged with treason or offences against the State, in virtue of an authority transferred or delegated by the Crown[3]. Akin to this direct interposition of the Home Secretary for the maintenance of order may be reckoned his duties in respect of the extradition of persons who have committed crimes in foreign countries and have taken refuge upon our shores.

His right to commit.

The Extradition Acts of 1870, 1873, and 1895[4] lay down rules for the surrender of fugitive criminals, which the King may make applicable by Order in Council to any foreign state with which an arrangement to that effect has been made. The process may be described as follows: the diplomatic representative of the country within whose jurisdiction the crime has been committed makes application to the Secretary of State, who thereupon decides whether the crime is of a political character. Should this be the case he is bound to make no order in the matter. If, however, the crime is non-political and is one of those included in the treaty arrangement between the countries, the Secretary of State sends an order to a police magistrate or justice of the peace for the issue of a warrant for the apprehension of the alleged criminal. Either of these last-mentioned officials may issue such a warrant, but must give notice thereof to the Secretary of State, who can, if he think fit, cancel the warrant and discharge the person

Procedure in cases of extradition.

Limited to non-political offences.

[1] 1 & 2 Will. IV, c. 41, s. 2.

[2] As a Privy Councillor he would be in the Commission of the Peace.

[3] The cases bearing on this point are *Entick* v. *Carrington*, 19 St. Tr. 1030; *R.* v. *Despard*, 7 T. R. 736; *Harrison* v. *Bush*, 5 E. & B. 353. The authorities are not clear or conclusive; but since all Privy Councillors are placed in the Commission of the Peace for every county we need not trouble ourselves to reconcile the *dicta* and decisions of Lords Camden, Kenyon, and Campbell.

[4] 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60; 58 & 59 Vict. c. 33.

Extradition.

apprehended. At the end of fifteen days, at the least, the Secretary of State may make an order under his hand and seal for the surrender of the criminal to a person duly authorized by the foreign State.

But the alleged criminal must not be surrendered for a political offence, nor be tried for any other crime than that for which he is surrendered, nor for fifteen days at least after his apprehension; nor—if he is charged with any offence committed within the jurisdiction of the English Courts—may he be surrendered until he has been tried and acquitted or has undergone sentence.

Fugitive offenders.

Analogous responsibilities and powers, free from some of the restrictions just mentioned, are possessed by the Secretary of State under the Fugitive Offenders Act[1] (1881) in respect of persons accused of offences in one part of the King's dominions and found in another part.

Territorial waters.

He is further required to consent to proceedings against a foreigner under the Territorial Waters Jurisdiction Act[2], and to explain, if called upon to do so by any Court within

Foreign jurisdiction.

British dominions, the nature of a jurisdiction claimed under the Foreign Jurisdiction Act[3]. *Such, and so miscellaneous are the duties of the Home Secretary in guarding against the possibilities of disorder.*

Police:

(2) For ordinary purposes we look to the police to keep order. A police force is a local force, and is, in England, with one exception, under the general control of a local authority. The exception is the Metropolitan Police Force in the administrative County of London. But in all cases the Home Secretary exercises supervision or control over the exercise of their powers by county and borough councils.

in counties,

In counties his sanction is necessary to the appointment of a Chief Constable. He must approve the numbers and pay of the force or any change therein; he must also sanction the rules made for its government and duties, for the distribution of the pension fund, and for the fees payable to police constables for the discharge of certain

[1] 44 & 45 Vict. c. 69. [2] 41 & 42 Vict. c. 73.
[3] 53 & 54 Vict. c. 37, s. 4.

duties. He appoints inspectors on whose report as to the efficiency of the force depends the subvention which is paid towards its maintenance from the Exchequer[1].

In boroughs, which have their own police, the Home Secretary receives reports from these inspectors in order that he may be satisfied as to the payment of this subvention. In the City of London the Commissioner of the City Police is appointed by the Mayor and Aldermen subject to his approval, and he sanctions the regulations made for the force.

in boroughs,

in London City,

But the Metropolitan Police have been under the immediate control of the Secretary of State ever since they were established in 1829 in substitution for the old local system of watchmen. The Metropolis for this purpose is a district constituted out of portions of the counties of Middlesex, Kent, and Surrey, from which is excepted the area comprised by the City. This district, which by 2 & 3 Vict. c. 47 included any part of a parish or place which was not more than fifteen miles distant from Charing Cross in a straight line, was extended by Order in Council of Jan. 3, 1840, over certain parishes specified in the Order[2]. Within this district the Home Secretary is the police authority. He advises the Crown as to the appointment of the Commissioner, Assistant-Commissioners, and Finance-Officer of the police: the rules for the government of the force, the pay and superannuation allowances of its members, the sites and construction of its buildings, are all determined by him or subject to his approval.

in London County.

The Commissioner has the practical and immediate control of the force, but in various details as to traffic in streets and licensing of refreshment houses and cabs, his action must be sanctioned by the Home Secretary, who is responsible to Parliament for the efficiency and good conduct of the force.

(3) As regards the machinery for the administration of justice, he advises the Crown as to the frequency with which assizes should be held, and how, on the occasions

The Home Secretary and the Courts.

[1] 51 & 52 Vict. c. 41, ss. 25, 27.

[2] Statutory Rules and Orders Revised, vol. iv, p. 1201.

when assizes are not held in each county, the most convenient arrangements may be made for the trial of prisoners.

As to Recorders.

Where a borough has not only a separate Commission of the Peace, but also a separate Court of Quarter Sessions, a judge of such a Court is appointed by the Crown on the advice of the Home Secretary. This judge is styled the Recorder; an increase to the Recorder's salary, the number of sittings of the Court (beyond four times a year), the appointment of a deputy, are all matters within his discretion[1].

Stipendiary magistrates.

He exercises powers of a very similar character as to the assistant judge of the London Sessions and the stipendiary magistrate of a borough; the appointments of the police magistrates in the Metropolis and the regulation of the business of their Courts are entirely in his hands: he also settles the fees to be taken by Clerks of the Peace and Clerks to the Justices[2], and fixes the salary to be paid to the Clerk of the Peace in lieu of fees: he also fixes the table of fees to be paid to prosecutors and witnesses.

The punishment of crime.

(4) The duties of the Home Office in respect of Prisons are connected with a long history of prison management and discipline which cannot be dealt with here. The institutions to be considered are of four kinds:—

Prisons.

(α) The prisons which are used for the detention of unconvicted as well as for the punishment of convicted persons.

As regards these prisons, the process by which the powers of the Home Secretary have grown at the expense of local authorities may be described as, first, inspection; next, regulation; lastly, complete responsibility and control. The three stages are illustrated by the Acts of 1835, 1865, and 1877.

By the last of these, 39 & 40 Vict. c. 21, s. 5, the prisons, their furniture and effects, the appointment and control of all officers, the control and custody of the prisoners, all powers and jurisdiction vested in prison authorities or jus-

[1] 45 & 46 Vict. c. 50, Part viii.

[2] 14 & 15 Vict. c. 55; 40 & 41 Vict. c. 43.

tices in session, at common law, by Statute or by charter, are transferred to and vested in the Secretary of State.

These matters are the subject of rules made by the Secretary of State, and he is further required to make rules as to the execution of a capital sentence within prison-walls, and to receive a certificate from the sheriff charged with the execution, in each case, that these rules are observed [1].

(*b*) Convict prisons to which persons sentenced to long terms of imprisonment are consigned.

Convict prisons.

In respect of these prisons the Secretary of State always enjoyed a special control over their officers, and over the mode of confinement of persons under sentence of penal servitude, the form of punishment substituted in 1857 for transportation [2].

Licences to be at large on condition of good behaviour are granted by the Crown through the Home Secretary [3], and the revocation of such a licence is signified by him to a police magistrate of the Metropolis, who is thereupon required to issue a warrant for the apprehension of the convict, which may be executed anywhere in the United Kingdom and Channel Islands.

(*c*) Asylums for the reception of criminal lunatics.

Criminal lunatics.

The Home Secretary has large powers over persons who are either found to be insane on arraignment, or tried and found by the jury to be guilty of the act charged but insane at the time, or who go mad in prison; he may direct the place of confinement, he has a discretion as to the time of discharge, and he appoints a council for the supervision of the State Asylum for criminal lunatics at Broadmoor [4].

(*d*) Reformatories and industrial schools for the correction of juvenile offenders.

Youthful offenders.

Reformatories.

Reformatories [5] are for offenders under sixteen years of age convicted of an offence punishable with penal servitude or imprisonment, and sentenced to detention in a reformatory, with or without a previous term of imprisonment [6].

[1] 31 & 32 Vict. c. 24. [2] 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.
[3] 27 & 28 Vict. c. 47, s. 3, and 54 & 55 Vict. c. 69.
[4] 23 & 24 Vict. c. 75; 47 & 48 Vict. c. 64.
[5] 29 & 30 Vict. c. 117; 35 & 36 Vict. c. 21, Part i. [6] 56 & 57 Vict. c. 43.

Industrial Schools.

Industrial schools[1] are for children over five years of age neglected by their parents, or not under proper control, vagrant, or associating with criminals.

The Home Secretary in respect of both these institutions appoints inspectors, certifies as to fitness, approves of rules and changes in building, has power of discharging or removing their inmates, and in other minor matters controls their action.

The prerogative of mercy.

(5) There remains in this department of his functions the duty of advising the Crown in its exercise of the prerogative of mercy. This prerogative is nothing more than an exercise of a discretion on the part of the Crown to dispense with or to modify punishments which common law or Statute would require to be inflicted. It is a dispensing power exercisable under strict limitations, and these limitations may be described as threefold[2].

A dispensing power.

Its extent and limits:

Firstly, the prerogative must be exercised in the case of offences of a public character. It is not limited to cases in *which the Crown is the prosecutor, for it extends to* persons found guilty and sentenced by the House of Lords after impeachment by the House of Commons, *but it must be so* used as not to affect private rights. It cannot prevent the bringing of an action, or hinder a suit for a penalty recoverable by the individual suing, after such a suit is begun; nor can a recognizance to keep the peace towards an individual be discharged by pardon.

must not affect private rights,

nor anticipate offences,

Secondly, it must not be anticipatory. The middle ages furnish us with instances of charters of pardon for offences not yet committed, which were in fact licences to commit crime; and the Act of Settlement points to the same danger where it enacts that a pardon may not be pleaded in bar of an impeachment. The meaning of this provision is that a Minister who executes a royal command, with an indemnity from the Crown against any legal risk which may

[1] 29 & 30 Vict. c. 118; 35 & 36 Vict. c. 21, Part ii. The law relating to reformatories and industrial schools is in course of amendment and consolidation in the Children's Bill now before Parliament (1908).

[2] See Chitty, Prerogative of the Crown, pp. 88-102.

follow upon obedience, may not set up such pardon or indemnity as a defence to an impeachment by the House of Commons.

Thirdly, a pardon extends only to the offence which has formed the subject of the criminal proceedings. The defendant's character and credit are cleared and renewed, and thus a disqualification may be removed by pardon which could not be removed by serving the sentence[1]. But a pardon does not affect private rights which may have accrued to the party aggrieved; nor where an office has been acquired by corruption, contrary to the provisions of a Statute, can a pardon do more than relieve from the penalty; it cannot restore the office[2]. only relieves from penalty.

Thus the prerogative is a discretionary power to remit or modify punishment for a public offence actually committed, a power which must not be exercised so as to infringe private rights or secure the offender in the proceeds of his wrongdoing.

The form of its exercise is by reprieve, commutation, or pardon. In every case a royal warrant is necessary for the remission of the sentence, but the grant of a pardon is attended with greater formality. A pardon was formerly incomplete unless it were under the Great Seal, but since 1827 a sign manual warrant countersigned by the Secretary of State is enough[3], and takes effect at once if it be a free pardon, or, if it be conditional, on the performance of the condition. Form of exercise.

The Criminal Appeal Act 1907[4] has not affected the prerogative of mercy or the duties of the Home Secretary. It has, however, given to him the power, in any case in which the exercise of the prerogative has been sought, of referring the case to the Court constituted under the Act, The Criminal Appeal Act.

[1] *Hay* v. *Justices of London*, 24 Q. B. D. 561. Conviction for felony is a disqualification for selling spirits by retail (33 & 34 Vict. c. 29, s. 14); but a free pardon was held to remove the disqualification.

[2] The acquisition of a benefice by simony, or of an office by a bargain contrary to 5 & 6 Eliz. 6, c. 16, are illustrations of this proposition. Chitty, Prerogative of the Crown, p. 92.

[3] 7 & 8 Geo. IV, c. 28, s. 13.

[4] 7 Ed. VII, c. 23.

or to obtain the assistance of the Court on any point arising out of the petition.

This Court may, on appeal made under conditions prescribed by the Act, on grounds of law or fact, set aside a conviction or modify a sentence. The Court can thus do what the Crown could not do—turn a verdict of guilty into a verdict of acquittal. Pardon, however ample, assumes that an offence has been committed; but the Court can say that there is no occasion for pardon because there was no offence.

(c) *The internal well-being of the country.*

Miscellaneous regulative duties.

It is under this head that the miscellaneous character of the duties of the Home Office is most apparent. Some of these have been taken away by the creation of a Secretary for Scotland, of a Board of Agriculture, and by the increased powers of the Local Government Board. But even thus I will not attempt to do more than classify roughly the duties without referring to the network of Statutes by which they are imposed. Some concern the general health *of the community, whether in respect of studies purporting to increase knowledge of the laws of health, as in the Acts* regulating schools of anatomy, or the practice of vivisection; or in respect of the wholesomeness of land or buildings, as in the case of the Acts relating to burials, to artisans' dwellings, to sewers, to nuisances, or to open spaces within the Metropolis; or in respect of persons unable to take care of themselves, as lunatics or habitual drunkards.

Health or safety *generally,*

or in special trades.

Some concern the health and safety of those engaged in particular trades, as in the case of the Acts regulating coal and metalliferous mines, the Explosives Act, the Factory Acts.

Preservation of useful things.

Some concern the preservation of things of use and consumption, as the Acts for the preservation of wild birds.

Some touch on education in so far as it is concerned with industrial schools and reformatories or with the employment of children in factories and mines.

Although the creation of new departments has relieved the Home Office from some portion of its miscellaneous

duties, yet the tendency of legislation is to increase the minuteness, complexity, and volume of those which remain. The Factory Act of 1901 will serve to illustrate this. And if this last group of duties was wholly removed, the Home Secretary would still be the chief organ for the expression of the royal will in administration, the Minister responsible for the maintenance of the King's peace and for the exercise of the prerogative of mercy.

§ 5. *Local Government*[1].

Topics of Local Government.

The topics assigned to local authorities show a constant tendency to increase in number and complexity. The administration of the Poor Law, that is, the rendering of relief to persons unable to support themselves; of the laws relating to public health; of the licensing laws; the maintenance of a police force; of highways and bridges; the provision of asylums for persons of unsound mind; the acquisition of land for small holdings, and, generally, the administration of the law relating to such holdings, to allotments, open spaces, and public footpaths—all these are the subject-matter of local government, nor is the list exhaustive.

Education in all its branches is also committed to the charge of local authorities, though here the councils concerned are able to avail themselves to some extent of outside assistance from persons willing to serve on Education Committees, or assist in other branches of the work.

I am here concerned with the relation of local authorities to the central government, and the topics of local government concern me only in so far as they illustrate this relation, or bring into play the action of different departments. But we must needs first consider the two great

[1] For obvious reasons of space and proportion I have confined what I have to say on Local Government to England. It may be enough to mention that Scotland has its Public Health Act, 30 & 31 Vict. c. 101, and Local Government Acts, 52 & 53 Vict. c. 50, and 57 & 58 Vict. c. 58. Ireland its Local Government Acts, 34 & 35 Vict. c. 109, and 35 & 36 Vict. c. 69; 61 & 62 Vict. c. 37. The working of these is supervised by Local Government Boards for Scotland and Ireland.

divisions of local government, rural and urban, and the matters with which they are mainly concerned.

Rural Local Government.

The Township:

One can but sketch in the barest outline the history of local government in what are now known as rural areas down to the great change effected by the Local Government Act of 1888. In the Saxon scheme of local government the township, or vill, stands at the bottom of the scale; feudalized later into some sort of correspondence with the manor, though the vill might include more than one manor, and the manor in its turn might contain a group of vills. But the duty of the township was to send four men and the *reeve to the County Court.* Where more than one manor was included in the township this duty was apportioned among the respective lords; and thus the township stands out as a unit distinct from the manor [1].

the Hundred:

Above the township came the hundred [2], a division of the county varying greatly in size in different parts of England, and the hundred had a Court, and certain communal duties; but these have long passed into abeyance.

the Shire moot:

So too had the work of the County Court—the shire moot wherein the business of the freeholders, judicial, civil, ecclesiastical, and military was conducted before the three presiding officers, the sheriff, the bishop, and the ealdorman [3]. But we need not follow the vicissitudes of the County Court; it is enough to say that for all practical purposes of administration the County Court, like that of the hundred, had ceased to exist.

the Justices of the Peace.

The great mass of the administrative work of a county, created by a long series of statutes, had been imposed upon the justices of the peace, sitting in quarter or special sessions; but the justices, though the most important element in county administration, formed but one of many authorities to whom the business of a rural area was

[1] Pollock and Maitland, Hist. of English Law, vol. i, p. 547, and ch. 3, § 7.

[2] The division is termed a *wapentake* in the counties of York, Lincoln, Derby, and Nottingham, and a *ward* in the northern counties.

[3] Stubbs, Const. Hist. i. 117.

assigned. The Parish, with its overseers, the Union with its Board of Guardians, the Sanitary authority or Local Board, the Highway Board, the Burial Board, the School Board combined to distract and confuse the legislator, the administrator, and the student. Rural authorities in 1888.

The administrative bodies for purposes of rural local government, since the legislation of 1888 and 1894, are the Parish Council, the District Council, the Administrative County, and, for certain purposes, the Justices of the Peace. Modern local authorities.

The Parish may be described as an interloper in our system of local government, as usurping the place which the township or vill should rightfully occupy. The parish was a purely ecclesiastical institution until 1601—when the provision for relief of the poor was taken up by the State and imposed as a duty upon the localities concerned [1]. The assembly of the parish had been used to meet to choose churchwardens and transact such business as was necessary for the maintenance of the services, fabrics, and ornaments of the church. This organization was ready to hand when a rate was ordered to be levied for the relief of the poor, and the administrative duties connected therewith were assigned to the churchwardens and to overseers nominated by the vestry and appointed by the justices of the peace. The Parish: ecclesiastical,

In the South of England, where parish and township were for the most part conterminous, this legislation worked easily: but in the north, where parishes were of great extent and might comprise several townships, difficulties arose. These were met by making the township the parish for poor-law purposes, and thus the civil parish came into existence [2]. And so the parish becomes an administrative unit; and, for purposes of local government, means a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed [3]. The framers of the Act of 1894 adopted this definition of a parish and, confining the operation of the Act to rural parishes, made provision for such a rectification of boundaries as would prevent any parish from extending civil.

[1] 43 Eliz. c. 2.
[2] 14 Car. II, c. 12.
[3] Interpretation Act, 52 & 53 Vict. c. 63.

into more than one administrative county. The rural parish thus constituted was endowed with local self-government through the agency of a Parish Meeting; and, where the population amounted to 300 or more, of a Parish Council. The Parish Meeting consists of the parochial electors who are persons on the register either for local government or parliamentary elections: this body must meet annually, or, if there is no Parish Council, twice in the year, and one meeting must take place on or within seven days of March 25.

The Parish Meeting.

The Parish Council.

Every parish must have a Parish Meeting; every parish with a population of 300 or more must have a Parish Council. If its population is 100 or more it may obtain a Council, as of course, on application to the County Council: if its population is less than 100, the consent of the County Council is needed as well as the request of the Parish. The County Council fixes the number of Councillors, which may vary from five to fifteen, and the Council, which holds office for three years[1], is bound to meet four times a year.

Business of the Parish Council.

Its business is the annual appointment of a chairman and overseer of the poor; the charge and management of the non-ecclesiastical property and documents of the parish: the hiring of land for allotments and small holdings, either by arrangement, or, with the consent of the County Council, by compulsion; the treatment of some minor sanitary matters; and, with the assent of the Parish Meeting, the enforcement of the Adoptive Acts. In furtherance of these purposes, apart from the expenses incident to the Adoptive Acts[2], a Parish Council may levy, on its own authority, a rate of *3d.* in the £1 or of *6d.* with the assent of the Parish Meeting.

The Rural District Council.

Next above the Parish Council comes the District Council. The Rural District Council takes its origin in the Poor Law Union, or group of parishes united for the

[1] 62 & 63 Vict. c. 10.

[2] These are set out in 56 & 57 Vict. c. 73, s. 57; the Baths and Washhouses Acts, 1846, 1882; the Burial Acts, 1882, 1885; the Public Improvements Act, 1860; and the Public Libraries Act, 1892.

administration of the Poor Law, the creation of the Poor Law Amendment Act of 1834. The Union had been made the Sanitary Authority under the Public Health Act 1875, but as that Act divided the country into rural and urban districts, the Union or Board of Guardians as a Sanitary Authority was liable to be cut in two if, as a Poor Law Authority, it was partly rural and partly urban. The Local Government Act of 1894 turned this authority into the District Council, and made provision that each District Council should be kept within the limits of an administrative county.

The Guardians of the Poor had contained a large *ex-officio* element—the Justices of the Peace—and had been elected on a franchise which proportioned the number of votes which each elector might give to the amount at which he was rated to the relief of the poor. The *ex-officio* element was struck out, and no elector was given more than one vote. The Guardians of the Poor.

The District Council is now the Board of Guardians, the Sanitary Authority, and the Highway Authority for its area, and has also taken over certain miscellaneous administrative powers hitherto enjoyed by the Justices of the Peace, as to the granting of licences other than licences for the sale of alcoholic drink, and other matters. Business of District Council.

The District Council has grown out of two institutions, each comparatively new, the Guardians of the Poor and the Rural Sanitary Authority; but the County Council takes us back to the shire moot of early days, though we must not suppose that the Council of the modern administrative county has much to do with the old county organization. The County Council.

The shire moot is the home of our representative institutions. Thither in Saxon and feudal times came the great lords and ecclesiastics of the shire, the knights and freeholders; the twelve lawful men from each hundred; and, from each township, four men, the reeve, and the parish priest. There justice was administered, taxation was assessed, the business of the shire transacted. But in feudal times the presiding officers underwent a change, the ealdor-

man ceased to exist; the Bishop attended at full sessions of the court, but ceased to be a presiding officer after the severance of the ecclesiastical and civil jurisdictions. And gradually the business of the County Court came to be dealt with elsewhere. Its functions for purposes of taxation and the discussion of matters of general concern practically ceased when representatives of shire and town were sent from the County Court to deal with these matters in Parliament. The King's justice, civil and criminal, effaced the local jurisdiction. Until 1872 the knights of the shire were formally elected in the County Court, and until 1880 the Coroner, who held the pleas of the Crown, was also there elected. These survivals were swept away by the Ballot Act of 1872 and the Local Government Act of 1888. Perhaps the only thing that could now happen to a man in the ancient County Court is the proclamation of his outlawry.

Its decadence:

the Justices of the Peace.

The administrative and judicial work of the county, which might have been done by a representative body, passed by a long series of Statutes to the Justices of the Peace, officers appointed by royal commission, usually by the Chancellor on the nomination of the Lord Lieutenant of the county, sometimes directly by the Chancellor. We may find that the Justice of the Peace is a more important personage when we deal with the Courts, for the judicial functions have survived the administrative. The most important of these last were the management of county finance, of the county police, and the grant, at special sessions, of licences for the sale of intoxicating drinks.

The administrative County.

This last, which is regarded as partly a judicial function, remains to the justices; the management of the police, as we shall see, is shared with the representatives of the County Council; the rest of the administrative work is, with very trifling exceptions, transferred to the Council. But the old county organization survives, not only in the Justice of the Peace, but in the great officers of the County, who have duties which are distinct from those of the *administrative County*.

The officers of

The Sheriff has from the earliest times represented the central authority in the execution of the law. Thus he

is the returning officer to whom writs are sent for the return of members for the Parliamentary divisions of the County. He fixes the days for nomination and polling, and informs the Clerk of the Crown as to the persons elected: he summons juries, and executes the judgments of the superior Courts in respect of persons or property within the county. Every year, on the morrow of St. Martin's Day, three landowners of the county are selected by the Chancellor of the Exchequer, the Judges, and other officers of State sitting in the King's Bench Division of the High Court of Justice. The choice of one out of the selected three is made by the King in Council, and the Sheriff is appointed by a warrant signed by the Clerk of the Council [1].

the County: the Sheriff,

The Lord Lieutenant came into existence in the reign of Henry VIII; in the following reign he took from the Sheriff the control which the latter had exercised over the military forces of the County. The military reforms of 1871 took from him the command of the Militia, the Yeomanry, and the Volunteers, but the Territorial Forces Act of 1907 brings him again into prominence in his relation to local reserve forces. Beyond this he appoints deputy lieutenants, and submits names to the Lord Chancellor of persons suitable to be placed on the Commission of the Peace.

Lord Lieutenant,

The Custos Rotulorum is the Keeper of the Records and the principal Justice of the Peace for the County. The office is almost always held by the Lord Lieutenant, but separate patents are made out for each office. The Lord Lieutenant is appointed by powers conferred on the Crown by the Militia Act 1882 [2], and recited in the patent. The King appoints to the more ancient office of Custos Rotulorum by virtue of Common Law Prerogative.

Custos Rotulorum,

The Coroner's office is one of great antiquity: he holds inquests in cases of sudden death; on the finding of these inquests indictments for murder or manslaughter may be founded. He was formerly elected, except in certain cases,

Coroner.

[1] 50 & 51 Vict. c. 55.

[2] 45 & 46 Vict. c. 49, s. 29.

by the freeholders of the county. He is now appointed by the County Council.

Connexion of local and central Government.

Thus we have the connexion of rural administration with central government established, up to a certain point, by these ancient offices. The Sheriff for the execution of the decision of the Courts, as the immediate representative of the Crown: the Lord Lieutenant for the local reserve of military force: the justices of the peace for a mass of judicial business, and the quasi-judicial business concerned with the licensing laws: the Coroner in certain cases where the King's peace or the King's interests may be concerned.

The modern County Council.

But a popularly elected body, the County Council, now transacts the general business of the county, including most of the work which was formerly done by the Justices of the Peace, and a good deal more. And this Council is kept in close and constant relation to the central Government. The Local Government Act of 1888 created the *administrative county*. This administrative area does not always coincide with the area of the ancient county, or the county for judicial and Parliamentary purposes[1]: and there is a considerable number of large towns[2] which have been constituted administrative counties, or county boroughs: these are for most purposes separate from the county in which they are geographically situate, and their councils possess not merely the powers enjoyed by a Municipal Corporation, but also the powers of a County Council under the Act of 1888.

Its composition.

A County Council consists of a chairman and vice-chairman, aldermen and councillors. The Local Government Board fixes the number of councillors, and the electoral divisions of the county: each division returns one councillor, and the qualification of the elector, as set out in the County

[1] There are sixty-three administrative counties in England and Wales, for Yorkshire and Lincolnshire are each divided into three, and Sussex and Suffolk into two administrative areas, while the Isle of Wight is severed from Hampshire, the Soke of Peterborough from Northamptonshire, and the Isle of Ely from Cambridgeshire; and London is also a county.

[2] There are now seventy-one county boroughs.

Electors Act 1888, is either the burgess qualification of the Municipal Corporation Act 1882, or the £10 occupation qualification for the vote at a Parliamentary election for a county, under the Registration Act 1885[1].

The aldermen are one-third in number of the councillors; their qualification is the same as that of councillors. They are elected for six years; councillors for three.

The duties of the County Council can only be shortly touched on. The finance of the county, the appointment and removal of the officers of the county (except the Clerk of the Peace and the justices' clerks), the provision for pauper lunatic asylums, and reformatory and industrial schools, the charge of bridges, the grant of licences for music, dancing, and racecourses, are perhaps the more important of the duties taken over from the Justices of the Peace. From the highway authorities comes the charge of the main roads. Its duties: general,

An important power conferred in the Act of 1888 was that of making by-laws either 'for good rule and government' or 'for the suppression of nuisances.' The former come into operation after submission to the Home Secretary for forty days, during which time they may be disallowed by the King in Council[2]; the latter must be approved by the Local Government Board[3]. the making of by-laws,

By the Education Act of 1902 the County Council is brought into contact with another department of the central Government—the Board of Education. The County Council is the Local Education Authority for purposes of elementary education throughout its area, except for elementary education in the case of boroughs of 10,000 and urban districts of 20,000 inhabitants[4]. It is also, Education,

[1] The County Electors Act, 51 Vict. c. 10. The Municipal Corporations Act, 45 & 46 Vict. c. 50. The Registration Act, 48 Vict. c. 15. The qualification under the Municipal Corporations Act is (1) occupation during the twelve months preceding the 15th of July in any year of a house, warehouse, shop, or other building in the area; (2) residence in or within seven miles of the area; (3) rating of qualifying property to poor rate of parish; (4) payment of all rates due in respect of it of preceding 5th of January by the 20th of July.

[2] 51 & 52 Vict. c. 41, s. 16. [3] 38 & 39 Vict. c. 55, ss. 102-87.

[4] 2 Ed. VII, c. 42, s. 1.

without these exceptions, the authority for higher education. The Council may, however, delegate all its powers in this respect, other than that of raising a rate or borrowing money, to a Committee, on which there must at least be a majority of members of the Council[1]. Subsequent enactments have made this authority responsible for the medical inspection of children[2], and have given powers to provide meals for children under certain conditions[3]: in this last matter, however, the Local Authority may associate itself with voluntary agencies.

relations of Council and Board of Education.

It will be seen that as regards elementary education a County Council has duties cast upon it of a definite character which the Board of Education has the means of enforcing[4]. In respect of higher education the duty is less precisely stated, and the Council may find that public schools, training colleges, and other institutions are already in possession of a part of the ground.

Nevertheless, the counties have set themselves in nearly all cases to frame schemes and carry them into effect so as to raise the standard and co-ordinate the branches of education within their areas, while the Board of Education, by means of the funds placed at its disposal for higher education, can exercise an influence on local action. Regulations governing the distribution of these funds may act as a guide or as a check to the local authority, which is tolerably certain to be glad of pecuniary assistance.

Small Holdings and the Board of Agriculture.

Yet another Government department is now brought into close relations with County Councils by the Small Holdings Act of 1907[5]. By this Act the Councils are required to frame schemes for small holdings within their areas, to invite applications for such holdings, to acquire land for the purpose, and to assume the position of landlords on a large scale, under pain of having the process effected for them by the Board of Agriculture.

It is enough to note the new relations to the central authority effected by an Act which is now only coming into operation.

[1] 2 Ed. VII, c. 42, s. 17. [2] 7 Ed. VII, c. 43, s. 13. [3] 6 Ed. VII, c. 57.
[4] 2 Ed. VII, c. 42, s. 16 and 4 Ed. VII, c. 10. [5] 7 Ed. VII, c. 54.

We thus find two authorities for the county, the one administrative the other mainly judicial, discharging their respective functions side by side, and at times brought into joint action. The Justices and the Council.

The County Council, a corporate body, elected, and representative, stands in necessary relations to the Home Office, the Local Government Board, the Boards of Education, and of Agriculture, and to the Privy Council: it is brought into contact for various purposes with District and Parish Councils. The County Council and central Government.

The Justices of the Peace exercise summary jurisdiction at general petty sessions, and at special sessions administer the law as to the licensing of premises for the sale of alcoholic liquor. At Quarter Sessions they try indictable offences, hear rating and licensing appeals; they appoint a Visiting Committee to visit the Prison, and report thereon from time to time to the Home Office, and a Licensing Committee for the purposes of the Act of 1904 [1]. Their connexion with the central Government is through the Chancellor, by whom they are appointed and may be dismissed, and the Home Secretary in respect of the administration of justice, of the Prison rules and the licensing laws. The Justices of the Peace and central Government.

But there is a meeting-point of these two county authorities in the, annually appointed, Standing Joint Committee, a body composed of representatives of the Justices and the Council. This Committee is responsible for the police force of the county. It appoints the Chief Constable subject to the approval of the Home Office, fixes the number of the police force, is responsible for the maintenance of the police stations and assize courts, and appoints the Clerk of the Peace, who is also the Clerk of the County Council. The Standing Joint Committee.

We may summarize roughly the distribution of public work in a county. The District Councils are the poor law and sanitary authorities; the Justices of the Peace are responsible for the administration of justice and of the licensing laws; the Standing Joint Committee are the authority for the police force; the rest of local administration, an ever-growing burden, falls on the Council of the County. Distribution of County business.

[1] 4 Ed. VII, c. 23.

Urban Local Government.

The Borough.

The history of the borough is a long one, and I will only indicate some of its landmarks.

The *burh* or walled town of Saxon times became the chartered borough of the Norman kings, which bought exemption from the assessment and jurisdiction of the shire[1]. From the end of the reign of Henry III such charters are not infrequent, all pointing to the same objects—the exclusion of the Sheriff, the election by the town of its own magistrates, and the determination of its own pleas apart from the County Court[1].

Its early history.

The constitution of these towns greatly varied, but from the reign of Henry VI onwards the tendency of charters which either conferred or regulated corporate rights was to diminish the rights of the townsmen and to increase those of the magistracy. The mayor and aldermen, or the corporate governing body, acquires the rights which had belonged to the freemen at large. More especially is this the case where a charter confers the right to return members to serve in Parliament.

While the King retained the power of appointing and dismissing the judges by whom the validity of these charters might be tried, the boroughs which returned members to the House of Commons were always liable to have their charters questioned, annulled, and remodelled to suit the political requirements of the King. The dealings of Charles II and James II with the borough charters are significant on this point. But in 1700 the Crown lost its control over the judges, and in 1832 the borough representation was settled by Statute. In 1835 the confused and multifarious borough constitutions were dealt with by the Municipal Corporations Act[2]: a model constitution was designed for corporate boroughs, and to these all existing incorporated boroughs, and such as might hereafter be chartered, were made to conform. The substance of this Act and of numerous

The Municipal Corporations Acts.

[1] Stubbs, Const. Hist. i. 408-12. [2] Ibid., ii. 217, 219.
[3] 5 & 6 Will. IV, c. 76.

amending Acts was consolidated in the Municipal Corporations Act, 1882 [1].

The Public Health Acts.

But a town need not be a *municipal borough* in order to possess an organization distinct from that of the county. It may be an *urban district*. The Public Health Act, 1875, divided all England and Wales into sanitary districts, rural or urban, and the Urban Sanitary Authority or Local Board, which was constituted in 1875 for carrying out the provisions of the Public Health Act, has become the Urban District of the Local Government Act of 1894.

The Municipal Corporation.

The Municipal Corporation is constituted by royal charter, granted by the King with the advice of the Privy Council, on petition of the resident householders of the town.

The Corporation consists of the burgesses, that is the ratepayers, a mayor, and aldermen. It acts through the Council, consisting of mayor, aldermen, and councillors. The burgesses elect the councillors, the councillors elect the aldermen, and the entire Council elects the mayor.

Its functions.

The Council so constituted administers the corporate property of the borough. Where the income of this property is insufficient to meet local purposes, a rate may be levied, and a return of income and expenditure for each year must be laid before the Local Government Board, though, except as to its education expenses, the accounts of a municipal corporation are not subject to the audit of the Board. For the sale of land forming part of the corporate property or for raising a loan on the security of that property the consent of the Local Government Board [2] must be obtained.

The Urban District.

The Urban District is not the creation of the Crown in Council, but is brought into existence and its area defined by the County Council or the Local Government Board. The County Council in this respect has large powers which the Local Government Board may control on the petition or by the consent of local authorities.

The Urban District is essentially a sanitary authority.

[1] 45 & 46 Vict. c. 50.

[2] Substituted for the Treasury (as in the Municipal Corporations Act, s. 106) by s. 72 of the Local Government Act, 1888.

but it is also, within its area, a highway authority; if it has a population of more than 20,000 it is an authority for elementary education, and it possesses some other miscellaneous administrative powers.

Comparison of their powers.

A municipal borough is also an urban sanitary authority, and we may thus compare the borough and urban district as respects their constitution and powers. I have described the different ways in which these two corporate bodies come into existence: the urban district council is more democratic in composition since it possesses no aldermen: as regards powers, the urban district council does not, under any circumstances, control its own police; a borough, if of more than 10,000 inhabitants, may do so; nor has an urban district ever a separate Commission of the Peace, as may be the case with a borough. For all purposes of carrying out the laws of health the two forms of urban government possess the same powers, but the by-law-making power of the urban district is governed by the Public Health Acts, and its exercise is entirely under the control of the Local Government Board [1], while a municipal corporation may also make by-laws for the good rule and government of the town, which are submitted to the Home Secretary, and, unless disallowed by the Privy Council, become valid in forty days [2].

Audit.

The urban district has the power to impose a district rate, and in respect of raising money by loan is placed on the footing of a municipal corporation, but its accounts are subject to the audit of the Local Government Board.

Poor Law administration.

Urban, as compared with rural, local government lacks completeness. Neither the urban district council nor the municipal borough administer the Poor Law. Side by side with the urban district council is the Board of Guardians, who are, since 1894, entirely an elected body. The Parish also is unchanged in urban districts. The sequence of Parish, District, and County Council, and the identity of the Guardians of the Poor with district councillors is confined to rural districts.

[1] 38 & 39 Vict. c. 55, s. 187. [2] 45 & 46 Vict. c. 50, s. 23.

The relation of borough or of the urban district to the county in which it is situate needs to be noted. Relations of County and Urban Government.

The County borough is an administrative county of itself, and is practically outside the county area[1]. The boroughs which are not county boroughs may be divided into those which have a population of 10,000 and upwards and those which fall below that number.

Those which are above 10,000 may again for certain purposes be subdivided into those which have a separate commission of the peace, with or without a separate Court of Quarter Sessions, and those which have not. But the division in respect of population is important in two respects.

The boroughs with the larger population are independent of the county in respect of the maintenance of a police force, which is raised by the borough and controlled by its Watch Committee. They are also independent as regards the provision of elementary education for the children within their area.

The urban district council has similar independence as regards education if the population of the area exceeds 20,000.

With these and some other less important exceptions, it may be said that the non-county borough and urban district are parts of the administrative county in which they are situate.

Before leaving the subject of urban government it may be worth taking note of urban terminology. Terminology.

Town is a term of very indefinite use. Blackstone says[2] that a town or township is synonymous with tithing or vill, and consists in the possession of 'a church with divine service, sacraments, and burials'; this he admits to be an ecclesiastical rather than a civil distinction, but he offers no other. He negatives the possession of a market as the distinguishing feature of a town, and suggests that it consisted in a *tithing* or group of ten families; but this was an association for police purposes. A town.

City used to be A city.

[1] There are seventy-one such boroughs.

[2] Comm., vol. i, p. 115.

defined as a town which possessed or had possessed a cathedral, but it is now merely a term of distinction sometimes conferred on great towns by letters patent, as upon Birmingham and Dundee[1].

A borough. *Borough* was formerly defined as a town, corporate or not, which sent members to Parliament, but the term is now properly applied to boroughs incorporated under the *Municipal Corporations Act*.

A county corporate. The county corporate was a town placed by royal favour in the position of a county, being exempt from the jurisdiction of the shire, possessing a sheriff of its own, having a separate commission of oyer and terminer and gaol delivery for the trial of offences committed within its boundary, and being for parliamentary purposes in a somewhat different position to other towns. But legislation as to municipal powers and on the subject of the franchise has reduced the distinction of these ancient borough counties to something merely nominal.

A county borough. There remain the county boroughs of the Local Government Act 1888. These are boroughs which either possess a population of not less than 50,000, or having a large population were also counties corporate. In these the mayor and council, as constituted by the Municipal Corporations Act, are invested with such larger powers as are conferred on the council of an administrative county.

Local Government and the Central Executive.

The local administrative bodies which I have described are controlled for most purposes by the Local Government Board. Similar departments, somewhat differently constituted, exist for Scotland[2] and Ireland[3], the one presided over by the Secretary for Scotland, the other by the Chief Secretary to the Lord Lieutenant.

I confine myself to the consideration of English local government, and will note very briefly the history of the duties as to the Poor Law, as to the creation of local ad-

[1] London Gazette, Jan. 18, 29, 1889. [2] 57 & 58 Vict. c. 58.
[3] 35 & 36 Vict. c. 69 and 61 & 62 Vict. c. 37.

ministrative bodies, and as to public health, which were assigned to the central department in 1871[1].

(a) *The Poor Law.*

The Poor Law Board.

The administration of the Poor Law Amendment Act of 1834[2] was vested in Commissioners appointed for a term of five years. This commission was renewed annually from 1839 to 1842, and was then re-appointed for five years. Its existence without a Parliamentary chief was not altogether happy[3], and in 1847 a Poor Law Board was constituted, consisting, like the phantom Boards which I have mentioned, of various great Officers of State, who with others nominated by the Crown were made, by letters patent, Commissioners 'for administering the relief of the poor in England.' One of these Commissioners was to be styled the President; the Commissioners were to appoint two Secretaries, and the office of President and of one of the Secretaries was made compatible with a seat in the House of Commons.

Its history.

Its end in 1871.

The President of the Poor Law Board with the Parliamentary Secretary was responsible to Parliament for the administration of the Poor Law from 1847 to 1871, and the office of President was held from time to time by a Minister of Cabinet rank. In 1871 the Poor Law Board ceased to exist, and its powers and duties were vested in the Local Government Board.

(b) *Public Health.*

Commencement of sanitary legislation.

Until the year 1847 there was no general legislation on sanitary matters. The Municipal Corporations Act (1835) gave power to the towns, which were or might hereafter be included in it, to make by-laws on various local matters, including the prevention of nuisances, and certain towns obtained special Acts of Parliament to enable them to carry out improvements. These Acts specified the improvements and the local Commissioners by whom the

Improvement Acts.

[1] 34 & 35 Vict. c. 70.

[2] 4 & 5 Will. IV, c. 76.

[3] Bagehot, English Constitution, 189.

improvements were to be effected and maintained. In 1847 were passed the Improvement Clauses Act and the Commissioners Clauses Act[1]. These Acts supplied common forms, the one for the election, meeting, powers and duties of the local improvement Commissioners, the other for the nature, mode of execution, and machinery for payment in respect of the improvements contemplated. Thus it was *possible to make the local* improvement Acts uniform and efficient.

Public Health Act, 1848.

In 1848 was passed the first Public Health Act[2]. This Act empowered *local authorities to deal with many matters* relating to health, drainage, water supply, removal or prevention of nuisances, offensive trades, street paving, common lodgings, burial-grounds.

The powers so created might be exercised by three different bodies. The Town Council, where the town was incorporated under the Municipal Corporations Act; the Improvement Commissioners, where these existed apart from a municipal corporation; the Local Board, a new institution, which might be brought into existence by Order in Council, on petition of the ratepayers addressed to a newly constituted Board of Health, or on the initiative of this Board where the sanitary arrangements of a district were especially bad. The Board of Health, variously constituted, acted as a central authority in sanitary matters for ten years, from 1848 to 1858, when it was allowed to expire. Its functions as regarded the prevention of diseases were assigned to the Privy Council, while those which related to the constitution of Local Boards fell to the Home Office, under the provisions of the Local Government Act of 1858[3].

The Board of Health,

its duties transferred

This Act amended the provisions of the Public Health Act, 1848, mainly as to the constitution and powers of the local authorities. The intervention of the Privy Council was no longer needed for their creation. A resolution of the Town Council in case of a municipal corporation—a resolution of the improvement Commissioners in a town which was under a local improvement Act, a resolution

[1] 10 & 11 Vict. cc. 16, 34. [2] 11 & 12 Vict. c. 63. [3] 21 & 22 Vict. c. 98.

of the ratepayers in places which had neither a Town Council nor an improvement Act, but did possess a defined boundary[1]—might be laid before one of His Majesty's Principal Secretaries of State, in practice the Home Secretary. A vote of the ratepayers so signified to the Home Secretary, and published by him in the London Gazette, was enough to constitute the Local Board. The exercise of their powers by these Boards was controlled by a sub-department of the Home Office, called the Local Government Act Office.

to the Home Office

From 1858 to 1871 the Home Office created and controlled local sanitary authorities, and the Privy Council enforced sanitary rules. This arrangement proved cumbrous in working. The functions of government connected 'with the supply of requisites for public health as at present regulated, after wandering through a labyrinth of local authorities, may be traced up to no fewer than three chief offices, the Privy Council, the Home Office, and the Poor Law Board; whilst certain collateral matters find their way to the Board of Trade.' So ran the report of the Sanitary Commission of 1869.

and Privy Council;

In 1871 the duties of Home Office and Privy Council alike were assigned to the newly-constituted Local Government Board. In 1872 the whole of England and Wales was divided into rural and urban sanitary districts[2]. In the former the Board of Guardians constituted the local sanitary authority, in the latter the Local Board above described.

and in 1871 to Local Government Board.

In 1875 the Public Health Act[3] consolidated the law upon the subject, and gave increased powers to the Local Government Board for creating and dissolving local sanitary authorities, for defining or changing their boundaries, and merging one district with another or turning that which was rural into urban, for instituting inquiries and compelling defaulting authorities to do their duty, either

[1] A place which did not possess a known boundary had to petition the Home Secretary to settle its boundaries before it could proceed to the constitution of a local authority.

[2] 35 & 36 Vict. c. 79.

[3] 38 & 39 Vict. c. 55.

on its own initiative or at the instance of persons aggrieved[1]. The district Council has now become the rural sanitary authority, and in towns either the Urban District Council or the Municipal Corporation administers the laws relating to Public Health.

(c) *Central Control.*

Local Authorities are brought into relations with various departments of Government, as I have shown, but the Local Government Board is the department specially constituted to supervise, aid, and control them.

Inspection.

The forms in which the central control manifests itself are various. The Board can inform itself of the action of the local authorities in the administration of the Poor Law and the law relating to public health by means of inspection; and the liability to inspection lies at the base of the connexion between local and central Government.

Orders and Regulations.

The Board may, on information thus acquired, or where necessary without special inquiry, make Orders or Regulations as to the mode of carrying out statutory duties imposed on local authorities. These orders are made in pursuance of statutory powers[2]. Where they are general they must lie before Parliament, and may be revoked by Order in Council. Where they are special they relate to some individual default of an authority in the discharge of its duty. Disobedience to an order may result in an application to the King's Bench Division for a *mandamus* to compel performance.

Model By-laws.

It is well to distinguish from Orders and Regulations of this sort the model By-laws which are from time to time issued by the Board. By-laws which may be made by Local Authorities for purposes of public health must be submitted to the Board. It is for public convenience, therefore, that the Board publishes model By-laws which serve

[1] The history of sanitary legislation, from the point of view of the expert in sanitary matters, is fully set forth in English Sanitary Institutions, by Sir John Simon.

[2] See 4 & 5 Will. IV, c. 76, s. 15; 38 & 39 Vict. c. 58, ss. 130, 134, 139.

to indicate the lines on which Local authorities may frame their rules without fear of disallowance.

Financial control is exercised in two ways. The accounts of every local authority except those of Municipal Boroughs are subject to audit, and in the case of these Boroughs their education accounts are not exempt from this process. What the auditor of the Board disallows becomes a surcharge falling upon those who incurred the expenses in question, and this is a substantial check on any departure from the lines within which extravagance is permissible at the cost of the ratepayer of to-day. The check on extravagance which may be a burden in the future is provided by the requirement that the sanction of the Board should be given to any loan raised by a local authority [1]. A loan raised without such authority would furnish a very poor security to the lender.

Audit.

Loans.

Inspection, Regulation, Audit of accounts, and restraint of borrowing powers are perhaps the main features of central control over local institutions. But they do not exhaust the forms or methods by which the local authorities are brought into contact with the departments of Government. Both the Local Government Board and the Board of Education possess powers of a judicial character for dealing with controversies between one set of authorities and another. Approval of appointments of officers, formation of areas, directions as to procedure, are some modes in which a Government department can make itself felt in local affairs. In some respects we may complain of laxity, in others of excessive minuteness, of control. It is enough for me to point out its general character, and the process by which local independence is combined with a certain homogeneity of institutions and their working [2].

General control.

[1] 38 & 39 Vict. c. 83.

[2] I have not thought it desirable to annotate this section with the references which a subject so full of technical detail might seem to demand. The reader who wants fuller or more precise information should refer to Wright and Hobhouse on Local Government, or the editions of the Local Government Acts of 1888 and 1894 by Macmorran and Dill. But for a full account of the history and law of the subject the treatise of Dr. Redlich on Local Government in England furnishes the

Section II

The Adjacent Islands

§ 1. *The Isle of Man.*

Isle of Man.

The Isle of Man has been in allegiance to the English Crown since the reign of Henry IV, but subject to its own laws and the jurisdiction of its own Courts. From the reign of Henry IV until 1735, with an interval during Elizabeth's reign, it was held of the Crown in fee by the House of Stanley. The tenure was on terms of doing homage and presenting two falcons to King or Queen at the Coronation. It then passed by inheritance to the Dukes of Athole, by whom the feudal rights were sold to the Crown in 1765, with a reservation of certain manorial rights and of the ecclesiastical patronage. These were bought by the Crown in 1829[1].

Executive.

A Lieutenant-Governor represents the Crown in the Island. He is appointed by sign manual warrant, accompanied by a letter of instructions. The police and the officials of the prison are responsible to him, and he appoints to offices in these departments, and also in the militia, a local defensive force of town and parish companies. The Governor himself is responsible to the Home Secretary, without whose permission he cannot leave the Island.

Legislature.

The Legislature of the Island consists of two Houses, the Governor in Council, and the House of Keys; the two sitting in Session make up the Court of Tynwald. The Acts of this body require the assent of the Crown in Council for their validity.

The Imperial Parliament determines the amount of the customs duties. The Imperial Government controls and collects them. If, after meeting the cost of government and contributing £10,000 to the consolidated fund, there

fullest and clearest information now available. It is to be regretted that throughout this treatise there should run a thread of political commentary, not necessary nor always just, and more appropriate to party journalism than to a great work of historical and analytical exposition.

[1] The purchase was sanctioned by 6 Geo. IV, c. 34.

remains a surplus, its disposal rests with the Court of Tynwald.

The Council of the Island consists of the Governor, Bishop, Archdeacon, Vicar-General, Attorney-General, Clerk of the Rolls, two Deemsters, and the Receiver-General: all these officers are appointed by the Crown, except the Vicar-General, who is appointed by the Bishop. Council.

The members of the House of Keys are twenty-four in number. Until 1866 they held seats for life, but could resign with the consent of the Governor. Vacancies were filled by the selection of one from two names submitted by the Governor to the House. The House of Keys would seem to have been in its origin a judicial body, and this may explain its want of initiative in the disposal of revenue. The House of Keys Election Act of 1866[1] made its members representative. Six sheadings, corresponding to counties, return three members each, the town of Douglas returns three, and three other towns each return one[2]. The duration of the House is seven years, unless dissolved earlier by the Governor. House of Keys.

The Deemsters hold weekly courts of criminal jurisdiction, having power to give sentences extending to two years imprisonment. The Governor sitting with the two Deemsters and the Clerk of the Rolls forms a Court of Chancery, Exchequer, Common Law and Gaol Delivery. The Staff of Government, a Court of Appeal from inferior jurisdictions, is similarly constituted. Judicature.

The Island is subject to the legislative power of Parliament, but is not bound by Statutes unless specially named therein. The writ of Habeas Corpus runs in the Island, and an appeal lies from the decrees and judgments of the Governor to the Crown in Council.

§ 2. *The Channel Islands.*

There are two governments in the Channel Islands—Jersey, and Guernsey with its dependencies. The immediate

[1] Statutes of the Isle of Man, vol. iii, p. 372.

[2] The franchise is, in sheadings, an £8 ownership and £12 occupation qualification; in towns, a uniform £8 qualification.

link with the central executive consists in each case of a Lieutenant-Governor appointed by the Crown on the recommendation of the War Office after consultation with the Home Office. But the powers and duties of these officers are not so extensive as are those of the Lieutenant-Governor of the Isle of Man: the Islands possess legislative and judicial institutions of their own, and are very tenacious of their rights in respect of them.

Jersey.

The constitutional history of Jersey is not uninstructive, and may be briefly sketched.

History. With the other Islands it was a part of the Duchy of Normandy: it passed to the English Crown when the Duke of Normandy became King of England, and remained to the English Crown when Normandy was lost.

Constitutional development. The Island was governed by a Warden or Bailiff acting as representative of the King, and occupying very much the position of a Sheriff of an English county, but there seems no evidence of the existence of any popular or representative body corresponding to the County Court. Like the Sheriff his judicial powers were limited, and itinerant justices came from the King's Court to hold pleas of the Crown. In the reign of John a body described as *duodecim coronatores jurati* was entrusted with the custody of the pleas of the Crown, and with them the Bailiff was em-

The Court. powered to try certain suits relating to land. At some later dates these *jurats* were ordered to be chosen, for life, from among the inhabitants of the Island 'per ministres Domini Regis et optimates patriae,' and permitted to deal with cases of all sorts except treason, and assault upon the King's Officers.

This body, the Bailiff and jurats, acted not only as a Court, but as a local legislature making by-laws or ordinances in matters of domestic concern relating to markets, prices, police, and public health.

The Governor and Bailiff. In the reign of Henry VII the position of the Bailiff underwent a change: he had become a nominee of the

Captain or Governor of the Island. In fact, the chief executive office of the Norman times had become duplicated. The Warden or Governor was a great personage who entrusted the civil government to a deputy, the Bailiff. These offices were now placed on a more equal footing; both were nominated by the King, the Bailiff was at the head of the local government, the Governor was confined to military and political functions, and represented the external power of the Crown. For the purpose of making Ordinances the Bailiff and jurats from time to time summoned to their assistance *the States*, consisting of the rectors and constables of each parish. The constables were chosen by the parishioners, and the two bodies would correspond to the estates of the Clergy and the Commons in England.

The States

In due time the States made the inevitable claim to be consulted, not at the pleasure of the Royal Court, but of right; and in 1771 a code of laws for the Island was confirmed by Order in Council[1], and it was laid down that no laws or ordinances should be passed, either provisionally or with the intention that they should receive the assent of the Crown in Council, unless by the whole Assembly of the States of the Island.

The C of 177

We may now therefore consider the composition and powers of this Assembly of the States.

Comp tion of sembl

First there are the nominees of the Crown. The Lieutenant- or Deputy-Governor has a right of veto, but no vote. The Bailiff, who presides, has a casting vote, but no other. The Attorney- and Solicitor-General have a right to be present, and to take part in debate, but have no vote. The *Visconte*, who discharges the executive functions of Sheriff and Coroner, has a seat, but no right to speak or vote[2].

Crown nomin

Next come the members of the Royal Court, the twelve jurats elected for life by the ratepayers of the Island. They must be native islanders, must possess real property of £720 in value, and are prohibited from the exercise of certain trades.

Royal Court.

Last come the States:—the twelve rectors of the parishes, appointed for life, and holding their seats *ex officio*; the

States.

[1] March 28, 1771.

[2] Order in Council, March 19, 1824.

twelve constables of the parishes, holding their seats *ex officio* and their offices for three years from the date of election[1]: the fourteen deputies, three for the parish of St. Helier, and one for each of the others. For these a triennial election is held in the month of December.

Legislative powers.

The legislative powers of the States are limited. Permanent legislation needs the assent of the Crown in Council. Provisional Ordinances may be made for local or immediate purposes, and these do not require to be expressly allowed. They do not remain in force for more than three years, but they may be renewed.

Veto and Dissent.

But all legislation, permanent or temporary, is subject to the *veto* of the Governor, or the *dissent* of the Bailiff[2]. The *veto* at once brings the proposed measure to nought. The *dissent* corresponds to the reservation of a Colonial Act by the Governor of a colony. It suspends the operation of measures until the King in Council has considered and allowed them.

Taxing powers.

The taxing powers of the States are also limited. The *hereditary revenues* of the Crown are collected by a Receiver General, and applied to official salaries and other purposes connected with the government of the Island. *The general levies*, taxes falling on property, need the sanction of the Crown, unless the money is needed for special and sudden emergency. The *impôts* or duties on wine and spirits are levied under the authority of letters patent of Charles II, which provide for their application to specified local purposes.

Imperial Statutes.

The islanders have claimed that neither Act of Parliament nor Order in Council is of force in the Island unless passed with the concurrence of the States. As regards Parliament, the claim, if seriously made at all, is made with reference to domestic as opposed to Imperial legislation: and Parliament would probably be unwilling to legislate on the domestic affairs of the Island without the good will

[1] The constables are chosen by the *principaux* of their respective parishes; these are parishioners owning property of the annual value of £160 and upwards.

[2] Order in Council, June 2, 1786.

of the States. For this reason the wretched judicial system of the Island remains unreformed. Acts of Parliament which affect the Island are transmitted thither by Order in Council, which directs that they should be registered and published; but this registration in no way adds to the binding force of the Statute.

Orders in Council.

There is a more grave dispute as to the right of the Crown to legislate by Order in Council without the concurrence of the States. It is maintained that no Order in Council may be put in force until it has been presented to the Royal Court for registration; that such registration may be suspended if the Order infringes the ancient laws and privileges of the Island [1]: and further that the making of an Order in Council without the concurrence of the States is an infringement of these privileges.

I will not pronounce upon a question which a Committee of the Privy Council have recently evaded [2]. It is sufficient to say that the rights of the Crown are asserted, and that they are contested except as regards the exercise of the prerogative of mercy [3].

Judicature.

The Royal Court which gradually became not merely a Court of Justice, but a local legislature, and was later compelled to share its legislative powers with the States, is still the Island judicature. The Bailiff and jurats are the

[1] These words are the substance of an Order in Council of May 21, 1679. This was repealed by an Order of December 17, 1679, to the effect that no Orders, save those which related to the public justice of the Island, needed registration for their enforcement. It is alleged that the Code of 1771 repealed the December Order and re-enacted the May Order. Even if this were so—and it seems open to doubt—the States would have to show that the ancient laws and privileges of the Island were infringed by legislation by Order in Council.

[2] The question came before the Committee of the Privy Council in 1894. An Order in Council had been made in 1891, regulating the Chairmanship of the Prison Board for Jersey. The States declined to register this Order and asked that it might be recalled, alleging among other reasons, that the Crown had no power to legislate for the Island without the consent of the States. The Committee of the Privy Council found other grounds for advising the Queen to comply with the wishes of the States. For the purposes of the argument a mass of information was collected, to which, by the kindness of the Right Honourable James Bryce, I have had the opportunity of referring.

[3] *In re* Daniel. Order in Council, January 12, 1891.

judges, but the jurats who are elected as members of the legislature do not necessarily know the law; being unpaid, they are under no obligation to learn it, and being elected for life, they are independent of criticism. The Bailiff, who is appointed by the Crown, is always a qualified lawyer, and receives an income from fees and direct payment of £720; but his opinion is of less weight than that of the ordinary jurat. He has no vote upon a judicial decision unless the jurats are equally divided: it has even been doubted whether, except under these circumstances, he may express an opinion.

The Courts.

The Court, thus constituted, sits either as a Court of first instance, when it consists of the Bailiff and two or three jurats, the *nombre inferieur*; or as a Court of Appeal, the Bailiff and seven jurats, the *nombre superieur*.

The Executive.

The Executive in Jersey is appointed, paid by, and responsible to the Crown. The Lieutenant-Governor directly represents the Crown for all military purposes, and for the exercise of the veto upon legislation. He is the medium of communication between the Island and the Home Government. In his military capacity he is responsible to the War Office; for other purposes to the Home Office.

Guernsey.

Guernsey.

The Bailiwick of Guernsey includes the adjacent Islands. The constitution of these differs only in details from that of Jersey. A Lieutenant-Governor represents the Crown here as in Jersey. The Royal Court, or *Chefs Plaids*, consisting of the Bailiff and twelve jurats, exercises legislative and judicial functions. It claims in its legislative capacity at certain sessions to make regulations called *Ordonnances*, which are of force in so far as they do not conflict with an Order in Council, or law emanating from a higher authority. These *Ordonnances* are in theory limited to regulations for the better enforcement of existing law. If they go further they need the assent of the Crown in Council. The Royal Court also formulates legislation which is submitted to the States: if approved by the States the proposed enactment

The Royal Court.

is submitted to the Crown in Council, and if there confirmed becomes law[1].

The States are representative of the entire community: they consist of two bodies: the larger, for the purpose of electing the jurats, a smaller one for purposes of legislation.

The larger body, the États d'élection, consists of the Bailiff and jurats, the rectors of eight parishes, the *douzeniers*[2], elected for life by the ratepayers of the eight parishes from among those who have served the office of constable. The number of *douzeniers* sent by each parish varies, but the total number is 180. These, with twenty constables elected by the ratepayers for three years, make up the États d'élection. The *États d'élection.*

The États de déliberation is a smaller body. The *douzeniers* of each parish, with the constable, form a parish council, and these attend personally at the États d'élection, but by deputies at the États de déliberation; the number of deputies is thus reduced to six from the town parish and its adjoining cantons, and nine from the county parishes. The *États de déliberation.*

The États de déliberation may tax within limits, and approve or reject legislation submitted to them from the *Chefs Plaids.* Their taxation, if it exceed certain limits, and their legislation in any event, needs the approval of the Crown in Council.

The Court of Guernsey, like that of Jersey, consists of the Bailiff and not less than two of the twelve jurats, an unskilled and unpaid body of men, appointed by popular election, for legislative rather than for judicial purposes. It exercises a criminal jurisdiction throughout the Bailiwick, and an appellate jurisdiction from the Court of Alderney. Judicature.

Alderney has its Court, its States, and its Executive, but the States of Guernsey may legislate for Alderney, subject to disallowance by the King in Council, and an appeal lies Alderney.

[1] Second Report on the State of the Criminal Law in the Channel Islands, Guernsey, 1847-8, pp. xi-xv.

[2] The *douzaine* is the parish council which provides for the relief of the poor, and the repair of roads, and makes the parochial rates.

from the Court of Alderney to the Court of Guernsey, subject to an appeal to the Judicial Committee of the Privy Council.

Sark has a similar Court with limited criminal jurisdiction.

The Church.

The Channel Islands are in the diocese of Winchester; there are twelve rectories in Jersey, eight in Guernsey, and a perpetual curacy of Alderney, all in the gift of the Crown on the recommendation of the Secretary of State. The Deans of Jersey and of Guernsey hold rectories in their respective Islands.

Section III

The Colonies

§ 1. *The Colonial Office*

The earliest colonies were acquired by conquest or discovery, and in the latter case were often regulated by a charter granted to a company or an individual. Their connexion with the central government was through the King in Council.

The Board of Trade and Plantations.

At the Restoration the affairs of the colonies were entrusted to a Committee of the Privy Council, and very shortly after to a Commission created by letters patent. This body was in 1672 combined with the Council for Trade, but in 1675 the commission was revoked, and the Privy Council resumed the management of colonial business. In 1695 the Commission of 1672 was revived as the Board of Trade and Plantations, but its powers were limited: its duty was to collect information, to report to the King in Council, and to give advice when required. The executive work was done by the Secretary of State for the Southern Department. The Board coexisted from 1768 to 1782 with a third Secretary of State for the Colonies. In 1782 the Board and the third Secretaryship were abolished [1]. Communications from the colonies were

[1] 22 Geo. III, c. 82.

to be addressed to the Privy Council, the executive business was transacted through the Home Office, and in 1786 a Committee of the Privy Council was constituted for Trade and Foreign Plantations. This Committee has passed into the Board of Trade[1]. In 1794 a third Secretary of State was appointed, mainly for the purposes of War, but in 1801 he was definitely described as Secretary of State for War and the Colonies. Through him was exercised the royal prerogative in respect of the colonies; and in 1854 he was relieved of his duties in the department of war. The Committee of Trade and Foreign Plantations still exists concealed behind the President of the Board of Trade; and a Secretary of State with a Parliamentary Under-Secretary and a large permanent staff now constitutes the Colonial Office.

The Colonial Secretary.

But the Colonial Office is now responsible for the government of British possessions which are not colonies. Outside the United Kingdom, and apart from the adjacent islands and British India, the dominions and dependencies of the Crown include colonies and protectorates. It is with these two last that we are here concerned.

Extent of his responsibility.

A Colony is defined by the Interpretation Act (1889) as 'any part of His Majesty's dominions exclusive of the British Islands and of British India[2].'

A Colony.

'Colony' then is a geographical, not a political term: it does not imply any form of government, nor is it precisely coextensive with the functions of the Colonial Office. Ascension, for instance, falls under the definition of a colony, but it is governed by the Admiralty: the protectorates are not a part of the King's dominions, but they are now, with very few exceptions, administered through the Colonial Office.

A Protectorate is not defined in the Interpretation Act, but it may fairly be described as a specific area of territory, not within the British Dominions, over which the King exercises sovereign rights, mainly based upon the Foreign Jurisdiction Act[3].

A Protectorate.

[1] See above, Part I, p. 195.

[2] 52 & 53 Vict. c. 63, s. 18.

[3] 53 & 54 Vict. c. 37. As to the nature of a Protectorate, see post, pp. 90-3.

As regards the colonies, certain general principles should *be borne in mind respecting them.* The Crown in Parliament can legislate for all and every one of the colonies, while the Crown in Council can also legislate for some. The Crown has a veto on all colonial legislation. The Crown is represented in every colony by an officer at the head of the executive government, usually called *the Governor*[1], and thus exercises a control varying in extent and character over the composition of the executive in every colony.

Crown colonies and self-governing colonies.

The colonies may be divided into two groups: the self-governing colonies, or those which possess responsible government, and the Crown colonies. We may put aside for the present the self-governing colonies.

The forms of government employed for Crown colonies and protectorates are largely the same, and they are dealt with by the same department of the central executive[2]: we may therefore deal with them together.

§ 2. *Crown Colonies and Protectorates.*

Colony as distinguished from Protectorate.

Before touching on these forms of government we should note the distinguishing characteristics of a colony and a protectorate.

First, a colony is British territory, a protectorate is not. Hence it follows that a man born in a British colony is a British citizen; a man born in a protectorate is *prima facie* an alien.

And secondly, a colony is only under certain conditions subject to legislation by the Crown in Council. A protectorate is always and necessarily so subject, because the powers possessed in respect of it are based on the Foreign Jurisdiction Act, which only comes into operation by Order in Council.

Legislation by Order in Council.

The right of the Crown to legislate thus in respect of colonies may originate in various ways.

[1] Sometimes Governor-General, Commissioner, or High Commissioner.

[2] This general statement needs to be qualified in the case of Zanzibar and of the governments of North Borneo and Sarawak, where the protectorates are under the Foreign Office, and of the Indian Protected States, whose relations are with the Secretary of State for India.

(1) A colony acquired by conquest or cession is by the common law prerogative of the Crown a subject for legislation by Order in Council. Under such an order the King can constitute the office of Governor by Letters Patent, and by the terms of these Letters, or by Instructions given to the Governor, can provide for the government of the colony. But this power does not exist in case of colonies acquired by settlement; and is lost when once representative institutions have been granted to a colony. Conquest or Cession.

(2) The British Settlements Act (1887) affects all new settlements where there is no existing civilized government, and certain settlements of older date, namely, the Falkland Islands, and the colonies established on the West Coast of Africa. Settlement.

By this Act Queen Victoria was empowered—

'To establish such laws and institutions, and to constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts, and for the administration of justice as may appear to Her Majesty in Council to be necessary to the peace, order, and good government of Her Majesty's subjects and others within any British settlement[1].'

These powers may be delegated in certain forms and subject to certain restrictions to any three or more persons within the settlement, but the right to legislate by Order in Council is reserved.

(3) Statutes have dealt with the government of individual colonies, but in different ways. The government of the Straits Settlements was separated from that of India by an Act of 1866[2], and powers corresponding to those of the British Settlements Act were conferred upon the Crown for the government of the newly constituted colony. Other colonies possessing constitutions with representative legislatures have by local Acts surrendered these constitutions and requested the Crown to make such provision for their government as might seem desirable. Statute.

This surrender has been confirmed by an Imperial Statute

[1] 50 & 51 Vict. c. 54.

[2] 29 & 30 Vict. c. 125.

and the Crown has thereupon framed constitutions by Letters Patent, reserving the right to legislate further by Order in Council if need be. This was the case with Grenada, St. Vincent, and Tobago in 1876[1]. Tobago some years later was taken out of this group of the Windward Islands and united in government with Trinidad by Order in Council made under 50 & 51 Vict. c. 44.

Surrender of colonial rights.

(4) Honduras, a colony acquired by settlement, by a local Act passed in 1870 abolished its Legislative Assembly and substituted therefor a Legislative Council, nominated by the Crown. This local Act received the assent of the Crown in Council, but no further powers of legislation by Order in Council are reserved to the Crown.

Protectorate.

The right of the Crown to legislate by Order in Council for a protectorate rests on the Foreign Jurisdiction Act of 1890[2], which consolidated previous existing Statutes on the subject. It might, in fact, be said that the protectorate in its most complete form is evolved from a broad construction of the earlier sections of that Act. The Act begins by reciting that 'by treaty, capitulation, grant, usage, sufferance, and other lawful means Her Majesty the Queen has jurisdiction within divers foreign countries,' and goes on to enact that the Crown may lawfully—

Source of power of Crown.

The Foreign Jurisdiction Act.

'Hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country, in the same and as ample a manner as if Her Majesty had acquired the jurisdiction by the *conquest or cession of territory*.'

And the second section makes provision for the case of a country not possessing a government from which such jurisdiction could be obtained in any of the methods above recited, enacting that there shall be the same jurisdiction over subjects of the Crown resident in or resorting to that country.

This jurisdiction was originally applicable to cases arising between British subjects, or between British subjects and

[1] 39 & 40 Vict. c. 47.

[2] 53 & 54 Vict. c. 37.

foreigners, acquiescent in the jurisdiction, in independent States where jurisdiction had been obtained in the manner recited in the Act: and it was brought into use by Order in Council.

Its extension to protectorates calls attention to the modes in which a protectorate may come into existence. A protectorate may be constituted by treaty with a foreign power which exercises an independent government. Such a power may place its foreign relations under the control of the British Government and administer its internal affairs under the guidance of a British resident, to the extent provided for in the agreement. The States of the Malay Peninsula and the Sultanate of Brunei are illustrations of this kind of protectorate; so is Zanzibar, though this last remains under the Foreign Office.

Modes of origin of protectorate.

On the other hand a protectorate may be established over territories owned by a number of tribal chiefs, where civilization, if it can be said to exist at all, is in a backward state, and where land, or the use and occupation of land, has been ceded on a large scale to the Crown, or to a company which has been superseded by the Crown, or which continues to govern under the supervision of the Foreign Office[1]. Such a protectorate is hardly distinguishable from the sovereignty which arises from conquest or settlement. Where a protectorate of this kind is constituted in territory which other European powers have agreed to regard as a British sphere of influence, it would seem impossible for any power to contest the right of the Crown to establish jurisdiction over all persons resident within the protected area. The protectorates throughout South Africa are of this character, and the Orders in Council upon which they rest proceed on a very liberal construction of the Foreign Jurisdiction Act[2]. They empower the High Commissioner 'by proclamation to provide for the administration of justice, the raising of revenue, and generally for the peace,

[1] The Royal Niger Company is an instance of a company whose rights and powers have been transferred to the Crown; while the British South Africa Company continues to govern in Rhodesia under conditions laid down in Orders in Council.

[2] Post, p. 93.

good order, and good government of all persons within the limits of this Order.'

Common features of colony and protectorate.

Although colony and protectorate differ thus in origin and in character, the same forms of government are used for both; and not only are the same forms used but the same government may include a colony and a protectorate. Thus the colony of Labuan, which until 1906 had a Governor of its own, is now administered, together with the protectorate over Brunei, by the Government of the Straits Settlements: the colony of Lagos is merged, for purposes of government, in the protectorate of Southern Nigeria; the Western Pacific Commission includes an island which is a colony by settlement, groups which by convention with Germany have been recognized as under British protection, other groups which we have taken under our protection without reference to other powers, and yet another group, the New Hebrides, in which we exercise a joint control with the Government of the French Republic.

Forms of Crown Colony government.

The feature common to all the forms of government in use for the Crown colonies and protectorates is the irresponsibility of the executive to a representation, in any form, of the people of the colony.

These forms of constitution range from government by a single executive officer, unassisted even by an official Council, to the combination of an elected representative Assembly with a nominated Legislative Council, and a Governor, representing the Crown, assisted by an Executive Council—a counterpart, but only in form, of the Constitution of the United Kingdom. The resemblance fails because this Executive Council is not responsible to the representative Assembly: its members are nominated by the Secretary of State at Whitehall, or subject to his approval. If they differ, on matters of policy, with the Assembly, there may be a difficulty about supplies. A deadlock may arise, for which the constitution provides no means of settlement.

This last type of constitution, which now only survives in the Bahamas, Bermuda, and Barbadoes, was at one time

the commonest form of colonial government. In the older colonies, where it existed, the possibilities of friction have been removed, either by the grant of responsible government or by the surrender of the original constitution and the acceptance of one which increases the power of the executive, and, in most cases, restores the right of the Crown to legislate by Order in Council [1].

The forms of constitution applicable alike to Crown colonies and protectorates fall into definite groups:—

Government with no legislature.

A. Some are administered by a Governor or Commissioner without a Legislative Council; and sometimes in subordination to a High Commissioner or to a more fully organized colonial government.

Thus Ashanti and the Northern Territories of the Gold Coast are administered by a resident Commissioner under the Government of the Gold Coast Colony.

Basutoland, Bechuanaland, and Swaziland are administered by resident Commissioners under the High Commissioner for South Africa, and the Western Pacific Islands by a High Commissioner, who is also Governor of Fiji.

Northern Nigeria is under a High Commissioner; Uganda, Weihaiwei [2], and Somaliland are under Commissioners; St. Helena has a Governor and an Executive Council; Gibraltar has a Governor, but no Council.

Three protectorates (the Gambia, Sierra Leone, and Southern Nigeria) are administered respectively by the governments of the colonies of the same name. They are, in fact, the *hinterlands* of their several colonies.

Government with nominated legislature.

B. The next form of colonial government is by a Governor and a Legislative Council, wholly nominated by the Crown. On this Legislative Council are placed the executive officers, who constitute a majority of the Council. The

[1] The grant of a representative assembly determines the right of the Crown to legislate by Order in Council. *Campbell* v. *Hall*, 20 State Trials, p. 329. The colonies in which this right has not been restored on the surrender and recasting of the constitution are Honduras and the Leeward Islands.

[2] Weihaiwei is held on lease from China.

Governor initiates and the official majority controls the legislation of the colony: in most cases there is an Executive as well as a Legislative Council. This form of government is used for protectorates as well as for colonies, as may be seen from the following list:—

British Honduras.	Nyassaland Protectorate.
Ceylon.	St. Lucia.
East Africa Protectorate.	St. Vincent.
The Falkland Islands.	The Seychelles.
Gambia.	Sierra Leone.
The Gold Coast.	Southern Nigeria.
Grenada.	Straits Settlements.
Hong Kong[1].	Trinidad and Tobago.

The constitutions of all these colonies have been framed or approved by the Crown in Council. Three at one time possessed representative assemblies, Honduras, Grenada, and St. Vincent. These have been surrendered by Acts of the local legislatures, confirmed in the case of the two islands by imperial Statute[2], in the case of Honduras by Order in Council.

The majority of this group are administered by a Governor with an Executive, and also with a Legislative Council. The Executive Council is wanting in the three Windward Islands, Grenada, St. Lucia, and St. Vincent, in the Seychelles, and in Nyassaland.

Colonies with partly elected legislative council.

C. The next group of colonies possess Legislative Councils, some of whose members are elected; but the constitution is careful to provide that these elected members should be in a minority. These are Fiji, Jamaica, the Leeward Islands, Malta, Mauritius.

The Governor of Fiji is also High Commissioner for the Western Pacific Islands. The Seychelles Islands were at one time administered from Mauritius, and the Turk's and Caicos Islands are now subordinate to the Government of Jamaica.

[1] Hong Kong includes the district of Kowloon, held on lease for a term of 99 years from China.

[2] 39 & 40 Vict. c. 47.

This group of colonies furnishes several instances of the surrender and exchange of representative institutions for the Crown colony form of government. The individual members of the Leeward Islands, federated since 1871, by an imperial Statute gave up their old elected assemblies [1], but are not subject to legislation by the Crown in Council.

Jamaica. Jamaica, which enjoyed a full counterpart of British institutions, a Governor, a Privy Council, a nominated Legislative Council, and an elected assembly, gave up this constitution by local Act in 1866, and is now ruled by a Governor, an Executive Council—still called a Privy Council—and a Legislative Council, of whom a minority are elected.

British Guiana. British Guiana and Cyprus possess Councils in which the elected members are in a majority. In British Guiana the Court of Policy or Legislative Council consists of the Governor, seven official and eight elected members; but the imposition of taxes, audit of accounts, and discussion of estimates is the work of the Combined Court, which consists of the Court of Policy and six financial representatives chosen on the same qualifications and under the same franchise as the elected members of the Court of Policy.

Cyprus, of which Great Britain enjoys the use and occupation on certain terms, for an undefined period, is governed, under the provisions of Orders in Council, by a High Commissioner with an Executive and a Legislative Council: the latter contains six nominated and twelve elected members.

Colonies with representative but not responsible government. D. There remains a group of three colonies which retain representative institutions without responsible government. These are Barbadoes, Bermuda, and the Bahamas. In each of these an attempt is made to bring executive and legislature together by the introduction into the executive of members of the representative Assembly [2]. In each we find a popularly elected Assembly, a nominated Legislative

[1] 34 & 35 Vict. c. 107.

[2] In Bermuda two places are reserved for unofficial members on the Executive Council, and are filled by two members of the Assembly. In the Bahamas the proportion is larger.

Council, a Governor, and an Executive Council not responsible to the electorate though containing some of its representatives. In Barbadoes we get the nearest approach to a Cabinet in the Executive Committee, a body distinct from the nominated Executive Council. This committee contains four members of the Assembly, chosen by the Governor: it prepares estimates, introduces money votes, and has the initiative in legislation as well as in taxation.

These three colonies represent a survival: it seems plain, not merely from the action of the colonies which have surrendered their constitutions, but from the recent cases of the Transvaal and Orange River Colonies, that experience approves two types of government and two only, the Crown colony and the self-governing colony.

§ 3. *The Self-governing Colonies.*

Meaning of responsible government.

The last group of colonies to be dealt with is that of the self-governing colonies or the colonies which possess responsible government. This means that the colony is administered by men who can command the support of a majority in the colonial legislature, not by men who, as in a Crown colony, are chosen by the Governor, or by the Secretary of State at Whitehall, and hold office irrespectively of the opinions of the representative Assembly, where one exists.

The Executive.

The Executive in such a colony consists of the Governor, nominated by the Crown, and a body of officials nominated not by the Crown but by the Governor: technically holding office at the pleasure of the Governor, as at home the heads of departments hold office at the pleasure of the King; but actually dependent for their continuance in office on the support of a majority in the Colonial Parliament.

The Legislature.

The Legislature consists of two chambers, except in certain provinces of the Dominion of Canada[1]; one usually called the Legislative Council or Senate—sometimes nominated, sometimes elected—and a Legislative Assembly which,

[1] Quebec and Nova Scotia possess two chambers; in the other provinces the Legislative Council has either been abolished, or, in the newer provinces, has never been created.

under different names in different colonies, corresponds to our House of Commons. The self-governing colonies are Canada, Newfoundland, New Zealand, the Cape Colony, Natal, the Transvaal Colony, the Orange River Colony, and the six colonies—New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia—which make up the Australian Commonwealth. Of these the two great Federations, the Dominion of Canada and the Commonwealth of Australia, will need separate consideration.

Responsible government a gradual growth.

It must not be supposed that responsible government, as we understand it, sprang into existence, fully developed, in the colonies, any more than it did at home. Canada is the birthplace of colonial responsible government, and there we can trace the growth of its principal features—the acceptance by the Governor of the advice of his responsible ministers and the presence of those ministers in one or other house of the Legislature, their dependence upon a Parliamentary majority for their continuance in office, the permanent tenure of office by the civil servant, and his exclusion from the Legislature. These principles developed in Canada between the years 1840–1850, notably during the time that Earl Grey was Colonial Secretary [1].

Traces of it in Statute.

Statutory provision for these essential features, where it exists at all, is not easily found. In a clause in the Act of the Victorian Parliament which formulated the existing constitution we find one such feature.

Victoria.

'§ 37. The appointments to public offices under the Government of Victoria, hereafter to become vacant or to be created, whether such offices be salaried or not, shall be vested in the Governor, with the advice of the Executive Council, *with the exception of the officers liable to retire from office on political grounds*, which appointments shall be vested in the Governor alone [2].'

The introduction into the Victorian Statute of a rule which is merely a convention of the English constitution is

[1] Egerton and Grant, Canadian Constitutional Development. Chapters on 'Responsible Government,' particularly pp. 307, 308 and 311, 312.

[2] The Act is in the Schedule of 18 & 19 Vict. c. 55.

of itself a curious illustration of the way in which custom crystallizes into law. But it must be confessed that to one who did not know the custom the words would be obscure. An officer *liable* to retire 'on political grounds' is a departmental chief or member of the Cabinet who goes out of office when his party has ceased to be in a majority in the elected legislature. The Act which made ministers in Cape Colony responsible to its Parliament recites as its object 'the introduction of the system of executive administration commonly called responsible government[1].' But nothing in the Act explains the phrase.

Cape Colony.

The convention, based on necessary convenience, which requires ministers to occupy seats in one or other house of the Legislature finds statutory expression in several of the colonial constitutions. In Western Australia one of the five holders of the executive offices *liable to be vacated on political grounds* must be a member of the Legislative Council. In Natal and in the Commonwealth of Australia[2] ministers must possess, or within a limited time obtain, seats in one or other chamber on pain of losing office. In South Australia we find that a minister may be liable to loss of office if *unable to become a member, or to obtain the support of a majority*[3] of the Parliament.

Australia and Natal.

Responsible government then, though some of its features have crept into colonial statutes, rests largely in the colonies, as here, upon convention. The basis of the constitutions of these colonies is either Imperial Statute, Local Statute confirmed by Order in Council, or Letters Patent. We may briefly note the main features of this form of colonial government.

The Governor as a colonial head of State:

The Governor stands at the head of the colonial executive, he is, for all the ordinary purposes of government, the constitutional sovereign. He summons, prorogues, dissolves the colonial legislative bodies; he exercises the prerogative

[1] Cape of Good Hope Statutes, No. 1 of 1872, vol. ii, p. 1191.

[2] Commonwealth of Australia Constitution Act, 63 & 64 Vict. c. 12, s. 9, sub-s. 64. 'After the first general election no Minister of State shall hold office for a longer term than three months unless he is or becomes a senator or a member of the House of Representatives.'

[3] South of Australia Statutes, No. 2 of 1855-6, s. 39.

of pardon; where the second chamber is nominated and not elective, he summons to the Legislative Council such persons as he and the Executive Council think fit; his assent to bills is necessary to their validity, but in most respects he acts, and is supposed to act, like the sovereign of these realms, on the advice of his ministers.

But the Governor stands to the Imperial Government as an officer of the Crown. His office is constituted and defined by Letters Patent; he acts under a Commission, and subject to Instructions which further define his powers. There are occasions when he cannot reconcile the two characters in which he is required to act, and the difficulties which thence arise must be dealt with presently. as an Imperial Officer.

The Executive Council is in most cases coextensive with a group of departmental chiefs changing with the rise and fall of party majorities. Sometimes, as in the Dominion of Canada, the Commonwealth of Australia, and the Colony of Victoria, the cabinet or group of departmental chiefs on leaving office remain members of the Executive Council, though they only attend its meetings for the transaction of formal business or to advise on non-political questions. In other words, in certain forms of colonial government we find both a Cabinet and also a Privy Council: in others the Cabinet does duty for both. Council and Cabinet.

The Legislative Council or Senate consists of persons nominated by the Governor in eight of the self-governing colonies—Canada, Newfoundland, New South Wales, New Zealand, Queensland, Natal, the Transvaal, and the Orange River Colony. In the rest, including the Commonwealth of Australia, the Legislative Council or Senate is elected, but on different conditions, either of franchise or tenure, to that of the other House. The Legislative Council.

Among the Canadian provincial governments Quebec and Nova Scotia alone are bicameral. The other provinces have either abolished their second chamber or have never possessed one.

The Lower House[1] in a self-governing colony is usually

[1] The title of the Lower House in the various colonies is worth noticing. In the Dominion of Canada it is the House of Commons, in

The Legislative Assembly.

chosen on a wide franchise[1]. Its natural term of existence is uniformly shorter than that of the Legislative Council, where the latter is subject to dissolution, varying from three to five years. Payment of members is almost universal. Two conventions of the Imperial Parliament are embodied in Statute, or observed in practice. The rule that money bills must originate in a recommendation from the representative of the Crown is based on Statute and not on standing order or convention; and in some form or other the initiative and control of the Lower House over such Bills is established.

Colonial Federation.

It remains to consider the two great Federations of self-governing colonies, the Dominion of Canada and the Commonwealth of Australia.

The federation of the Canadian colonies is provided for under the British North America Act of 1867. The Australian Commonwealth Constitution Act of 1900 contains the terms of Australian federal government.

The Dominion of Canada.

The history of the movement towards federation would not be in place here. It is enough to say that the British North America Act provided for the immediate federation of Canada, Nova Scotia, and New Brunswick, for the division of Canada into the two provinces of Ontario and Quebec, and for the admission of the rest of British North America into the scheme of Federal Government. Under this Act Manitoba was introduced in 1870, when the North-West Territories were acquired from the Hudson's Bay Company, British Columbia joined in 1871, Prince Edward Island in 1873, and the new provinces of Alberta and Saskatchewan were created out of the North-West Territories in 1905. The residue of those territories is administered by a Commissioner under the Colonial Government.

The Commonwealth of Australia.

In Australia the entire group of self-governing colonies came at once into the federal system, but the isolation of

the Commonwealth of Australia and the Dominion of New Zealand it is the House of Representatives, in Cape Colony, Newfoundland, South Australia, and Tasmania, the House of Assembly, elsewhere the Legislative Assembly.

[1] The franchise is extended to women in New Zealand, Queensland, New South Wales, South Australia, and Western Australia.

Australia in respect of other countries and the complete development of responsible government in all the federating colonies have brought about some contrasts which it is proper to note.

Similarities.

In each we have a Governor-General, representing the Crown in the Federal Government, and Governors of the Provinces or States which form the federation. In each we have a central legislature, and state or provincial legislatures. In each we have a supreme court capable of determining questions which may arise between the central or Federal Government and Parliament, and the Governments or Parliaments of the States which constitute the Federation.

Contrasts.

The Provinces and States.

But the two constitutions differ in some conspicuous features. The Provinces of the Canadian Federation are much more intimately connected with the central Federal Government than are the States in the Australian Commonwealth, and for this reason. The States are self-governing colonies. The Provinces sacrificed many of the rights of a self-governing colony for the sake of a more intimate union. This difference appears in various ways.

The two Senates.

The Senate of the Dominion is nominated by the Governor-General, and its members hold their seats for life. The Australian Senate is elected, six members from each State, for a term of six years. The Canadian Senate is also constituted so as to secure a representation of each Province, but whereas in Australia each State sends the same number of representatives to the Senate, in Canada the amount of representation is proportioned to the population of each province.

Provincial and State Governors.

Again, the Lieutenant-Governors of the Canadian Provinces are appointed and can be dismissed by the Governor-General; the Governors of the Australian States are appointed by the Crown.

Legislation by Provinces:

The legislation of the Canadian Provinces is subject to the veto of the Governor-General, and this veto, as it would seem, must be exercised on the advice of his responsible ministers by the Governor-General in Council [1],

[1] See 30 & 31 Vict. c. 3, ss. 55, 56, 57, 90, and Todd Parl. Govt. in Colonies, ch. xv, pp. 448–56.

and not by the Governor-General as an imperial officer exercising a discretion in the interests of the home and colonial governments. It would follow from this view of the matter that the Bill of a provincial legislature could not go beyond the Governor-General or be submitted to the Secretary of State for confirmation or disallowance. If the measure is inexpedient, the Governor-General must nevertheless affirm it if his responsible ministers so advise him. If when so affirmed it is alleged to be beyond the powers of the provincial legislature, the matter may come before the Courts and so, ultimately, before the Judicial Committee of the Privy Council.

and by States.

The legislation of an Australian State does not come before the Government of the Commonwealth; if affirmed or reserved by the Governor of the State it passes at once to the Colonial Office for the consideration of the Secretary of State.

Relations of State and Federal Legislatures in Australia:

And this points to a very marked difference between the legislative powers of the Australian States and the Canadian Provinces, and of their Federal Legislatures.

The Parliaments of the Australian States have unrestricted powers of legislation; the Commonwealth Parliament is confined to certain subjects which concern the Commonwealth as a whole [1]; but if a State Parliament should legislate on a subject assigned to the Commonwealth Parliament, and should legislate in a sense repugnant to that of the Federal Legislature, the latter would prevail [2].

in Canada.

In Canada certain subjects are assigned to the Dominion Parliament and certain other subjects to the Parliaments of the Provinces [3], and the legislative powers thus concerned are mutually exclusive. Certain subjects occupy an intermediate ground and are common to both [4], but in case of a conflict of law the Dominion Statute prevails.

The local and domestic character of the subjects assigned to the provincial legislatures may explain the abolition of the second chamber in all but two of the provinces.

[1] 63 & 64 Vict. c. 12, s. 51.
[2] 63 & 64 Vict. c. 12, s. 109.
[3] 30 & 31 Vict. ss. 91, 92.
[4] Ibid. s. 95.

Constituent powers.

It remains to note that the Dominion Parliament possesses very limited power to alter the Federal Constitution, while the powers conferred on the Commonwealth Parliament, though quite general, must be exercised subject to provisions which secure the submission of the proposed change, by *referendum* to the entire electorate [1].

The Commonwealth constitution does not only provide against hasty changes in the constitution, but against unconsidered legislation of any sort, by means of elaborate arrangements for the settlement of a disagreement between the two Houses [2].

§ 4. *General Principles of Colonial Government.*

The relations of the colonies to the Crown have been indicated as they came under consideration in respect of the various types of colonial constitution in the foregoing pages, but they need more consecutive and somewhat fuller treatment.

The colonies, however complete may be their general measure of self-government, are a part of the British Empire, and are dependent upon it.

This dependence appears, first, in the veto upon all colonial legislation, which may be exercised either through the Governor of a colony as representing the Crown, or by the Crown in Council. A Bill which has passed the two chambers of a colonial Legislature must go before the Governor for rejection, reservation, or assent. He may exercise his veto, and the Bill is then lost. He may reserve the Bill for the ascertainment of His Majesty's pleasure, and he may do this either because there is something exceptional in the nature of the Bill, or because it is one of a kind which, by the terms of the colonial constitution or of his Instructions [3], he is bound to reserve: the Bill

[1] 63 & 64 Vict. c. 12, s. 128. [2] Ibid. s. 57.

[3] If the matters for reservation are only set forth in the Instructions, and the Governor neglect to observe them, and so give his consent to a Bill which should have been reserved, the law will not on that account be inoperative. Colonial Laws Validity Act, 28 & 29 Vict. c. 63, s. 4.

in such cases remains inoperative until the pleasure of the Crown is expressed.

He may assent to the Bill, but even then it must be reported to the Secretary of State for the Colonies, who may within two years from its communication advise the King to disallow it. In such cases the King's pleasure is signified to a self-governing colony by Order in Council, to a Crown colony by dispatch: but disallowance is of rare occurrence, and would only take place where imperial interests are involved.

Legislation by King in Council.

Besides the universal power of veto upon legislation, the King in Council can legislate for certain colonies, and for all protectorates by Order in Council.

Restrictions: settled colonies,

This power is restricted, primarily, in respect of colonies to such as are acquired by conquest or cession; it does not extend to colonies acquired by settlement. The English settler carries with him into the land which becomes British territory by his settlement the law and the liberties of the British citizen. The Imperial Parliament alone can legislate for him. This rule, however, is applicable only to colonies thus acquired before the British Settlements Act of 1887, which dealt with certain existing colonies[1] and with any which might thereafter be acquired by settlement. For these the Crown may legislate by Order in Council, or may delegate the power of legislation to three or more persons within the colony. Apart from imperial legislation, or legislation under the above-named Act, the English settler takes with him the law of England as it stood at the date of settlement.

or where representative institutions granted.

Another restriction on the right of the Crown to legislate by Order in Council is to be found in the rule that when once a representative legislature is granted to a colony, that colony is subject only to legislation by its own assembly or by the Imperial Parliament.

Grenada was a Crown colony: the King could make laws and levy taxes. In October, 1763, he issued a proclamation promising to the colony a representative legislative

[1] 50 & 51 Vict. c. 54, which dealt specifically with the settlements on the West Coast of Africa and the Falkland Islands.

assembly. In April, 1764, he gave a commission to the Governor to summon such an assembly to make laws in the usual forms. In July, 1764, he issued Letters Patent imposing upon Grenada a duty, already imposed on the other Leeward Islands, of 4½ per cent. on all exported goods in lieu of other customs or import duties. Campbell paid the duty and sued Hall, the collector, for the amount. Lord Mansfield in giving judgment for the plaintiff said :—

Lord Mansfield in *Campbell* v. *Hall.*

'We think that by the two proclamations and the commission to Governor Melville, the King had immediately and irrevocably granted to all who did or should inhabit or who did or should have property in the island of Grenada—in short to all whom it might concern—that the subordinate legislature over the island should be exercised by the assembly in the same manner as the other provinces under the King.

'And therefore, though the right of the King to have levied taxes was good, and the duty reasonable, equitable and expedient; yet by the inadvertence of the King's servants in the order in which the several instruments passed the office (for the Patent of July, 1764, for raising the impost should have been first) the order is inverted, and the last we think contrary to and a violation of the first, and therefore void.

'How proper soever the thing may be respecting the object of these Letters Patent, it can only now be done by an Act of the assembly of the island or *by the Parliament of Great Britain*[1].'

Legislation by Parliament.

And thus we pass from the legislative powers of the Crown in Council to those of the Crown in Parliament. The powers of a Colonial Parliament are limited to its own territory: the Imperial Parliament can legislate for the whole of the King's dominions. But Parliament will not use this power for purposes of taxation, and rarely, and only where imperial interests are concerned, for legislation which would affect the internal affairs of a colony. The need of imperial legislation is found more especially in matters where colonial legislation is desired to operate outside the boundaries of the colony, and this can only be effected by the aid of the Imperial Parliament. In respect of matters

[1] *Campbell* v. *Hall*, 20 State Trials, p. 329.

such as merchant shipping, bankruptcy, extradition, crime committed on the high seas, coinage, and the like, imperial statutes either make provision, or come in aid of the colonial legislature [1].

The supremacy of the Imperial Parliament is indicated in the Colonial Laws Validity Act (1865), which provides that:—

'Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative [2].'

§ 5. *The Colonial Governor.*

The representative of the Sovereign:

The Governor of a colony represents the King. His office is constituted and his powers defined by *Letters Patent*; he is appointed by *Commission*; and the manner in which his duties are to be carried out is further set forth in *Instructions*.

his executive powers;

His principal executive powers are these.

He convokes and prorogues legislative assemblies, directs the issue of writs for the summons of such as are elected, and dissolves those which are liable to dissolution.

Bills passed by a colonial legislature come before him for assent, veto, or reservation.

his part in legislation;

In colonies which do not possess responsible government he initiates legislation: in the self-governing colonies a message from him is the foundation of any proposal for a grant of money, and he issues warrants for its expenditure [3].

[1] See Jenkyns, British Rule and Jurisdiction beyond Seas, pp. 26-31.

[2] 28 & 29 Vict. c. 63.

[3] The conflict which arose in Victoria in 1878 between the two Houses led to a difficulty as to the issue of public money without Parliamentary authority, a course pressed upon the Governor, Sir George Bowen, by his ministers, and successfully resisted by him until the two Houses came to a compromise and passed an appropriation Bill. Todd, Parl. Govt. in Colonies, pp. 723-30.

He exercises the prerogative of pardon, but in a self-governing colony he does so on the advice of his ministers, and only assumes personal responsibility if the matter should affect interests outside the colony. *his prerogative of mercy;*

In Crown colonies he appoints to vacant offices, absolutely, or provisionally on the approval of the Crown, according to the tenor of his letters patent or *instructions*, or the terms of local law, and can suspend or dismiss the holders of office subject to regulations. In colonies which possess responsible government he can appoint or dismiss all public servants who hold at pleasure, and can appoint to all public offices, but in this he acts with the advice of his Council. *appointment to office;*

In the self-governing colonies the powers of the Governor are nominally wider than in the Crown colonies, where the duties of the Governor are precisely set forth in his instructions. But within the range of those instructions the Governor of a Crown colony acts with independence. He is given certain limited powers to use at his discretion. *his powers in Crown colonies and*

The distinction is to be seen in the relation of ministers to the Governor: in a Crown colony ministers are responsible to the Governor, in a self-governing colony they are responsible to the electorate. Hence the Governor of a self-governing colony is a constitutional king; his discretion must be that of his responsible advisers; he may endeavour to influence them, but he must not act contrary to their final decision, unless Imperial interests are in issue or unless he is prepared to appeal from them to the colonial Parliament and ultimately to the colonial electorate. *in self-governing colonies.*

An illustration of this principle was afforded in New Zealand in 1892. A Prime Minister with a large majority in the elected chamber had so few supporters in the nominated second chamber that he not only could not carry his measures, he could hardly obtain a discussion for them. There was no limit to the numbers of the upper chamber, and the Ministry asked the Governor to create a sufficient number of additional members to give them a majority. The Governor refused to create the full number for which his ministers asked, on the ground that the existing state

of parties was abnormal, and that the satisfaction of the demand would permanently alter the political character of the second chamber. On reference to the Colonial Office, however, he was instructed that, where no imperial interests were concerned, and where there was no reason for doubting that the constituencies were of one mind with his responsible ministers, he must follow their advice[1]. The difficulties which confront the Governor of a colony are sometimes due to a want of definite party divisions, or perhaps, more truly, to the existence of several parties, no one of which possesses a commanding majority. Political combinations become complicated when a group can hold the balance between two parties, and a nominated Legislative Council is not in accord with the ministers of the day. Demands may be made on one side for a creation of members of the Legislative Council to carry measures which may not have been fairly submitted to the constituencies, on the other side for a change of ministers and a dissolution which may ascertain the opinion of the country.

And these difficulties are perhaps increased because our self-governing colonies have come into a heritage of constitutional government which they have not earned. Like the children of a man who has painfully acquired a great fortune, they would spend without self-restraint; they wish to enjoy their liberties and are impatient of conventions. Yet in government, as in daily life, the observance of conventions is apt to smooth the path of every one.

But the Governor is not only a constitutional monarch for the purposes of the colony, he is an officer of the Crown who is bound to consider imperial interests where these come in conflict, as sometimes happens, with the policy or wishes of his colonial ministers. This may arise in the rejection or reservation of bills, in the exercise of the prerogative of pardon, in the use of the power of dissolution. On such occasions the position of the Governor, involving the discharge of a double duty to the King and to the colony, needs the employment of the utmost discretion.

[1] House of Commons Papers, 198 of 1893, p. 48. Until the end of 1891 members of the Council held their seats for life.

Legal liability,

The legal liability of the colonial Governor throws some light on the character of his office.

He can be sued in the Courts of the colony in the ordinary forms of procedure. Whether the cause of action spring from liabilities incurred by him in his private or in his public capacity, he enjoys no *prima facie* immunity. Though he represents the Crown, he has none of the legal irresponsibility of the Sovereign within the compass of his delegated and limited sovereignty [1].

for acts done as Governor,

More important are the questions which arise from time to time as to the limits of his liability, civil or criminal, whether in the colonial Courts or in the Courts of this country, for acts done in his capacity of Governor.

The first question to be answered is whether, apart from his position of Governor, *any* liability has arisen: this of course is a matter of general law, except in so far as the position of Governor may involve greater responsibility, and consequently justify more prompt measures for the repression of violence or disorder likely to lead to violence [2].

depends on his legal powers,

But assuming that a liability has been shown to exist, the next question to be answered is whether the acts complained of were done by the Governor of the colony *as Governor*; this is matter of fact; a further question follows, if so done, were they *acts of state*, that is, acts covered by the powers assigned to the Governor. It is not enough that the acts shall be such as the King, through his ministers, might lawfully do; it must be ascertained by reference to the letters patent and instructions with which the Governor of a Crown colony is furnished, or to the executive powers conferred by imperial or colonial law upon a Governor in a self-governing colony, whether the acts done are justified by the powers conferred [3]. If they are, the Governor is protected; he is a servant of the

[1] *Hill* v. *Bigge*, 3 Moore, P. C. 465. *Musgrave* v. *Pulido*, 5 App. Ca. 102. The Colonial Governor differs herein from the Lord-Lieutenant of Ireland, against whom no action can be maintained in Ireland while Viceroy of that kingdom for acts done in his official capacity. *Sullivan* v. *Spencer*, v. Irish Rep. C. L. 177.

[2] *Phillips* v. *Eyre*, L. R., 6 Q. B. pp. 15, 16.

[3] *Cameron* v. *Kyte*, 3 Knapp, 332.

Crown, doing that which the King might do by his servants, and has commissioned him to do if required. If the acts done are outside the powers conferred, the fact that the Governor assumed to do them *as Governor* will not protect him from their legal consequences [1].

not on his position as Governor.

We might speculate as to the legal position of the Governor of a self-governing colony, if on the advice of his responsible ministers he gave an order which the law would not support, and was sued by a person injured thereby. He does not seem to possess the legal irresponsibility of the Sovereign. Presumably he would refuse to act on the advice of his ministers unless the action recommended was so obviously desirable, and his ministers so clearly acting with the good will of the community, that they were certain to ensure the passing of an Act of Indemnity.

Section IV

India

§ 1. *The Emperor of India.*

The long history of the East India Company and its relations with the Crown and Parliament can have no place here. Students of that history will know or learn how a trading company with a temporary charter grew into a territorial sovereign subordinate to the English Crown and Parliament [2]: how the hold of the State upon

[1] *Musgrave* v. *Pulido*, 5 App. Ca. 111. 'Let it be granted that, for acts of power done by a Governor *under and within the limits of his commission*, he is protected, because in doing them he is a servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of State.'

It must be understood that 'acts of State' as between sovereign and subject must be acts such as the sovereign can lawfully do. If one should allege of an act complained of, that, though unlawful in itself, it is a matter of State policy or necessity, the answer is, in the words of Lord Camden, that 'the common law does not understand that kind of reasoning.' *Entick* v. *Carrington*, State Trials, 19, p. 1030.

[2] See the preamble to 53 Geo. III, c. 155, where territories of the Company are described as '*subject to the undoubted sovereignty* of the Crown.'

the Company and the control of its action became closer and closer as the charters came up for renewal from time to time: how after the Indian Mutiny the dual control of India was brought to an end, and the government of India was by Statute assigned to the Crown.

The King of the United Kingdom of Great Britain and Ireland and of the British dominions beyond the seas is Emperor of India[1].

The character of the Indian Government.

The title suggests, what is the case, that the government of India does not correspond in character to the government of the British dominions beyond the seas. From the executive point of view, and apart from the legislative supremacy of Parliament, the colonies are governed by the King in Council, acting on the advice of the Secretary of State for the Colonies. But India is governed by the King-Emperor on the advice of the Secretary of State for India, and the Secretary of State has a Council, the Council of India, whose advice on almost all questions of Indian policy he must receive, whose concurrence is necessary in certain cases for the validity of his action. The relations of the Secretary of State to his Council are different in character from those of the First Lord of the Admiralty to the Admiralty Board, or of the Secretary of State for War to the Army Council. They also differ—because they are real—from the relations of the First Lord of the Treasury or the Presidents of Government Departments to their respective Boards. They will have to be considered with reference to the Viceroy of India and the executive and legislative Councils through whom the government of India, subject to the control of the central executive, is carried on.

The Council of India.

[1] 39 Vict. c. 10 recites (1) the Act of Union with Ireland which empowered the King to assume such title as he thought fit by proclamation under the Great Seal, (2) the assumption of the title of King 'of the United Kingdom of Great Britain and Ireland,' (3) the Act of 1858 and the vesting of Indian Government in the Crown, and proceeds to empower the Queen by proclamation under the Great Seal 'to make such addition to the style and titles at present appertaining to the Imperial Crown of the United Kingdom and its dependencies as to Her Majesty may seem meet.' The title of Empress of India was shortly after assumed by Her Majesty.

The Secretary of State.

The Secretary of State for India, assisted by his Council, by a Parliamentary Under-Secretary and by a permanent staff, is responsible to the Crown and to Parliament for the exercise of the royal prerogative in the government of India. The Act for the better government of India, 1858 [1], regulates the central executive; the local executive and the judiciary were dealt with in Acts of 1861 [2]. These Acts, modified in some particulars though not in essentials, constitute the framework of our Indian Government.

The King appoints the great officers for India, the Governor-General or Viceroy, the Governors of Madras and Bombay, and their Councils, and the Judges of the High Courts, by warrant under the sign manual. The Secretary of State exercises a larger discretion, and one more independent of Parliament, than that of any minister except perhaps the Secretary of State for Foreign Affairs. In relation to the Native States, business of political or military character, often very important, must be transacted on his sole responsibility, and he must judge as to the propriety of bringing these matters before the Prime Minister and the Cabinet.

§ 2. *The India Office.*

(a) *The Secretary of State* and *his Council.*

The Council. Mode of appointment. Number.

The Secretary of State appoints the members of the Council of India: they are not appointed by the King on his recommendation, nor is he required to make the appointment in Council [3]. The number of the Council was originally fixed at fifteen, of whom nine must have served or resided in India for not less than ten years within ten years of their appointment. The Secretary of State may, if he pleases, forbear to fill vacancies on the Council so long as the numbers are not less than ten [4]. They hold

[1] 21 & 22 Vict. c. 106.

[2] The Indian Civil Service Act, 24 & 25 Vict. c. 54; the Indian Councils Act, 24 & 25 Vict. c. 67; the Indian High Courts Act, 24 & 25 Vict. c. 104.

[3] See as to appointment and conditions of tenure of members of the Council, 21 & 22 Vict. c. 106, s. 10; 32 & 33 Vict. c. 97, s. 1; 39 Vict. c. 7, s. 1

[4] 52 & 53 Vict. c. 65.

office for ten years, subject to the conditions of good behaviour, and liability to removal by address of both Houses of Parliament. But three may be appointed, on special professional or other qualifications during good behaviour, or a member may be continued for five years at the expiration of his ten years' service. The reasons for such last-mentioned appointments, or continuations of appointments, must be laid before Parliament. Tenure.

The Council must meet at least once a week; but the Secretary of State may summon it when and as often as he pleases[1]. Every order or communication proposed to be sent to India, and every order made in the United Kingdom under the Act which provides for the better government of India, must either be brought before the Council at a meeting, or laid on its table for seven days before a meeting. If a majority of the Council should differ from the Secretary of State, he may, except in certain cases where a majority is expressly required, overrule his Council. In such a case he must record his reasons for dissent. The general requirement of submission to the Council, before action is taken, of all communications with India is subject to exception in the case of *secret* or *urgent* orders. Transaction of business.

Secret orders are such as relate to making war or peace, or entering into treaty or negotiation with a native or other State.

Urgent orders seem to be matters in which it is important that the Secretary of State should act at once: and these he must, after acting, communicate to the Council, together with the reasons for urgency.

(b) *The Secretary of State* in *Council.*

So far we have considered the powers of the Secretary of State exercising the prerogatives of the Crown with the assistance of a Council. But there are certain acts which must be done by him *in* Council, and certain matters in which he can only act with a majority of his Council.

[1] The Secretary of State can divide the Council into Committees for the convenient transaction of business. To one of these, the Political Committee, it is usual to communicate *secret* orders.

Things to be done in Council.

Laws made by the Indian Government, or by the Governments of Madras and Bombay, come into force when they have received the assent of the Governor-General, but the King may disallow them, as in the case of a colonial law. Such disallowance is signified to the Government of India by the Secretary of State *in Council*. Again, if the Indian Government desires by proclamations to alter provincial boundaries or to create a provincial Council, the previous sanction of the King is communicated by the Secretary of State *in Council*. Again, the Secretary of State must do certain things *in Council*, although the Council cannot control his discretion: such are appointments, promotions, or removals in the establishment of the India Office, or the making of regulations for the admission of candidates to the Indian Civil Service.

Things to be done with Council.

Again, there are certain matters in which he cannot act without a majority of the Council. Here he must act not only *in* Council but *with* Council. He cannot otherwise grant or appropriate any part of the Indian revenues; or borrow money in Great Britain upon the security of the Indian revenues; or buy, sell, or mortgage real or personal property; or regulate official patronage in India; or deal in various ways with Indian appointments.

It will seem that this Council, whose members may not sit in Parliament, is in the main an advisory board. The cases in which the assent of a majority of the Council is required in order that action may be taken are limited in number; and in all cases the Secretary of State, a Cabinet minister, speaking, it may be, with the authority of the Cabinet, and responsible to Parliament, can make it very difficult for his Council to differ from him.

(c) *Parliamentary Control.*

Things to be sanctioned by Parliament.

In certain matters the action of the Secretary of State and the Council is not valid unless it is sanctioned by Parliament[1]. This sanction may need to be expressed directly, as when the revenues of India are applied to pay for military operations beyond the Indian frontier, or impliedly,

[1] 21 & 22 Vict. c. 106, ss. 15, 32, 54, 56; 39 Vict. c. 7, s. 1.

as where notice of a commencement of hostilities, of the reappointment of a member of the Council, or of proposed regulations for the admission of candidates to the Indian Civil Service, are required to be laid before Parliament for, or within, a certain time.

When a change is proposed in the numbers or salaries of the establishment of the India Office, such change must be made by order of the King in Council (not the Council of India), and the order must be laid before Parliament within fourteen days of its making or of the next meeting of Parliament.

§ 3. *The Indian Government.*

The King appoints by warrant under the sign manual the Governor-General of India, the Governors of the Presidencies of Madras, or Fort St. George, and of Bombay, the members of their respective Councils, the Judges of the High Courts of Calcutta, Madras, Bombay, and the North-West Provinces. All Indian appointments, unless otherwise provided for, are vested in the King, acting on the advice of the Secretary of State.

The local government of India, if one may use such a term of so august a body as the Governor-General in Council, is constituted on the lines of a Crown colony. The acts of the government are the acts of the Governor-General in Council. This is an executive Council appointed by the Crown for a term of five years. In this Council the Viceroy has, like the Secretary of State in the Home Council, a single vote, and a casting vote; but like the Secretary of State he can overrule the decision of his Council, and must then record the grounds of his action. He can make war and peace; but an order to commence hostilities must be made known to Parliament within three months, if it be sitting, or if it be not sitting, within a month of its next Session. He may in Council constitute new provinces, appoint a Lieutenant-Governor to a province so constituted, and define his authority, and he may alter the boundaries of existing provinces. This he does by proclamation, but no such proclamation is of force

The Governor-General in Council for executive purposes:

until the sanction of the King is communicated to the Governor-General by the Secretary of State.

the duties of the Council;

The Council consists of five members, unless the King should be advised to appoint a sixth; and the Commander-in-Chief may be, in fact always is, made an extraordinary member by the Secretary of State[1]. But the executive work of the Government is conducted by departments, more numerous than the members of Council, each under a permanent secretary. Every member of the Council is charged with the care of one or more of these departments, but that of Foreign Affairs is under the Viceroy himself.

the permanent staff.

It should be noted that the permanent secretary does not stand to the member of Council, under whose charge his department is placed, in the same relation as the permanent staff in a department of Government at home stand to their official chief. The Prime Minister would not communicate with the staff of any office unless he was acting in conjunction with the political head of the office, but the secretaries in the Indian Government stand in immediate relation to the Viceroy, and he may confer with or instruct any of them without reference to the member of his Council in charge of the department concerned.

The Council for Legislative purposes.

Legislation is effected by the Governor-General in Council, but for these purposes the Council is increased by not less than ten nor more than sixteen additional members, nominated by the Governor-General; of these a certain number must be non-official.

The legislative powers of the Governor-General in Council are wide, but subject to definite limitations[2], and on the introduction of certain sorts of measures the Governor-General has a veto[3]. He may refuse his assent to a law passed by the majority of the Council or may reserve it, and so suspend its operation until the King has

[1] He is also, since 1905, in charge of the army department.

[2] Ilbert, Government of India, ed. 2, p. 116 and pp. 200-4.

[3] The Governor-General's veto affects measures touching:—
(1) the public debt or charging the revenues of India;
(2) the religion or rights and usages of His Majesty's subjects in India;
(3) the discipline of naval or military forces;
(4) the relations with foreign Princes or States.

signified his assent. If he assents the law takes effect, unless and until it is disallowed by the Secretary of State in Council. The Government of the Presidencies is similar in character to the Government of the Indian Empire.

The Provinces.

There are in British India thirteen provinces, which include the two Presidencies of Madras and Bombay, five Lieutenant-Governorships, and six Chief Commissionerships. The Lieutenant-Governors have in each case a legislative, but not an executive, council, with limited powers of legislation [1].

The Presidencies.

The Governor of each of the old Presidencies of Madras and Bombay has a Council for executive and a larger Council for legislative purposes. But his legislation is subject not only to the Royal veto, but also to the veto of the Governor-General. Nor can his Council initiate without the consent of the Governor-General any of the matters which the Governor-General may forbid to be introduced to his own Council, nor, in addition, matters affecting (1) communication by post or telegraph, (2) coinage, (3) the penal code, (4) patent or copyright.

The relations of the Indian army, and of the Indian Courts to the central authority and the central judicature may be more properly discussed in later chapters. It would be beyond the scope of this treatise to go further into the details of Indian Government.

Section V

Miscellaneous Possessions, Dependencies and Protectorates

§ 1. *Miscellaneous Possessions.*

Aden.

Under this heading must be placed some possessions of the Crown which do not fall into either of the preceding sections. The Peninsula of Aden and the Island of Perim, adjacent to it at the mouth of the Red Sea, are governed from Bombay, and in strictness form a part of British India. So too does the Island of Socotra, about 300 miles to the south-east of Aden. The Island of Ascension in the

Ascension.

[1] Ilbert, Government of India, ed. 2, pp. 114, 115.

South Atlantic, with a population of about 166, is under the supervision of the Lords of the Admiralty; so, too, would seem to be the little settlement of Tristan d'Acunha, with its population of eighty-four, where 'the inhabitants practically enjoy their goods in common, and there is no strong drink on the island and no crime[1].' Some small islands in the Indian Ocean, and the Island of Sombrero in the West Indies, are used for lighthouses maintained by the Board of Trade[2]; others in the Pacific are leased by the High Commissioner for the Western Pacific after consultation with the Treasury.

Islands.

§ 2. *Dependent States; Protectorates and Spheres of Influence.*

These relations differ in character: the dependent or protected states may stand in varying degrees of dependence upon the government of this country.

Sphere of influence

But a sphere of influence should at once be distinguished from a protectorate; for the recognition of an area as a sphere of British influence brings the government of this country into no necessary relations with the dwellers on this area: it means no more than this—that other countries have by treaty with the Crown undertaken not to interfere either by acquisitions of territory, creation of protectorates, or imposition of treaty obligations with any influence which the King may be advised to exercise within this area.

and protectorate; control of foreign relations

It would seem to be an essential feature of a protectorate that the foreign relations of the protected state should be under the control of the protecting state; the usual form in which such relations arise in international law is by treaty between these two states, or between the protecting state and other states. In either case, the return for protection would be a subordination of the protected to the protector in all dealings with outside powers.

It would naturally follow that if we interpose between the protected state and foreign powers we make ourselves

[1] Colonial Office List for 1908, p. 405. [2] Ibid., p. 406.

responsible for the security of the subjects of those powers while under the jurisdiction of the protected state. The control of foreign relations therefore necessarily carries with it some rights and duties respecting the internal affairs of the state so controlled, and this leads to difficult questions, some of international, some of municipal law. and internal affairs.

The protectorates with which we are concerned may be divided into those in which there is, and those in which there is not a settled government.

The Indian protected states stand apart. The King is Emperor of India, the rulers of the native states owe political allegiance to him, and though their territories are not British territory, they are for international purposes included in the Indian Empire, and stand in a relation to this country very different to that of the African protectorates where no settled form of government existed, or to states, territorially separate, with definite international relations [1]. It must therefore suffice here to say that there are in India, dependent on the Imperial Government, about 600 native states varying almost infinitely in size, population, and importance, covering nearly 700,000 square miles with a population of fifty-five millions. The degrees of dependence vary, but in all alike we find that the British Government controls the external or foreign relations, makes itself generally responsible for the internal peace and good order of the native state, and specially responsible for the safety of British subjects resident therein, and further requires the native state to assist in repelling attacks from abroad, and in maintaining order at home. India stands apart.

The control thus laid on the action of these dependent states is exercised through a British Resident appointed for this purpose by the Governor-General. The Protectorate here is exercised by the India Office.

The Protectorates in which a settled form of government exists—Zanzibar, Brunei, North Borneo, Sarawak, and the Malay States—possess these features in common, that the British Government by treaty exercises a control over their Protected States: Zanzibar,

[1] Ilbert, Government of India, ed. 2, p. 392. Hall, Foreign Jurisdiction of the British Crown, p. 206.

foreign relations, and a jurisdiction over British subjects within their territories. The Malay States are practically controlled in their internal affairs by the advice of a British Resident, a phenomenon exhibited on a larger scale in the case of Egypt. North Borneo and Sarawak are curious examples of independent sovereignty exercised by British subjects under the protection of the Crown, but not within the dominions of the Crown. In Sarawak, as in Brunei, foreign relations are controlled and questions of succession determined by the British Government, which also in the case of North Borneo approves the Governor appointed by the Chartered Company.

Malay States,

North Borneo,

Sarawak, Brunei.

There remain the Protectorate in the Pacific Islands, and the group of Protectorates in Africa. The rights exercised by the Crown in these places, where no settled government exists, have developed in accordance with the gradually extended construction of the Act of the Berlin Conference of 1885. This Act was designed to meet the creation of protectorates, by the signatory powers, on the African coast, and to ensure securities for law and order to the subjects of states travelling or resident therein.

Protectorates where no state exists.

The rights assumed by the Crown under the Berlin Act were based at first on a strict construction of the Foreign Jurisdiction Act, which enables the Crown to exercise jurisdiction, acquired in certain ways, in foreign countries, over its own subjects and those of consenting powers, and in uncivilized countries over its own subjects[1]. France and Germany, from the first, construed their powers under the Berlin Act more widely, and as conferring jurisdiction over the subjects of other countries than their own.

Jurisdiction:

The Orders in Council made for these regions of the Empire down to the year 1891 show an evident desire to mark a distinction between the rights conferred by a protectorate and those of territorial sovereignty. Thus the Africa Order in Council of 1889[2] assumed jurisdiction, within the protectorates to which it referred, over British subjects and foreigners who assented, or whose governments had assented, to the exercise of this jurisdiction.

its development

[1] 53 & 54 Vict. c. 37, ss. 1, 2. [2] Stat. Rules and Orders, vol. iii, p. 259.

But the Africa Order of 1892[1] extended this jurisdiction to the subjects of the signatory powers without the express consent of their governments, and the Order in Council of May 9, 1891[2], constituting the Protectorate of Bechuanaland assumes a general jurisdiction over all persons within the area concerned. From this time forward Orders in Council relating to the South African protectorates have followed the lines of the Bechuanaland Order[3]. and extension.

It is to be observed that these Orders are made under powers vested in His Majesty 'by virtue of the Foreign Jurisdiction Act *or otherwise*,' and it may be in virtue of the common law prerogative, applied to a protectorate as though it were ceded territory, for the government of which some provision must be made, that the Orders entrust the representative of the Crown with the very wide powers conferred upon him.

These powers include the provision, by Proclamation, for the peace, order, and good government of all persons within the limits of the Order, 'including the prohibition and punishment of all acts tending to disturb the public peace.' The Crown can, under these orders, acquire land through its representatives, and, where conceptions of ownership in land are vague, or where there are large tracts unoccupied or waste, can exercise a general control over the dealings with the waste[4]. The rights exercised over these protectorates may be said to differ from territorial sovereignty in little but name. Government and jurisdiction.

There still remain for consideration the territories acquired by Chartered Companies ruling as sovereign states under the protection of the Government at home, as in the case of North Borneo and Sarawak, where the central authority is represented by the Foreign Office, or with Chartered Companies.

[1] Stat. Rules and Orders 1892, p. 486.

[2] Stat. Rules and Orders 1891, p. 295. This Order was framed in the Colonial Office, which took a bolder line on this question than the Foreign Office, under which, at this time, several of the African Protectorates were administered.

[3] A similar change is observable in the earlier Orders in Council relating to the Western Pacific and the Pacific Order in Council of 1893.

[4] As in East Africa and Uganda. Stat. Rules and Orders 1898, pp. 381, 382.

powers exercisable under the supervision of a High Commissioner, himself a servant of the Colonial Office, as in the case of North and South Rhodesia.

The Chartered Companies.

The charter of the South African Company [1] enables it to acquire territory, to make ordinances and to exercise jurisdiction, subject to the approval and continuous supervision of the Secretary of State. A good illustration of the practical working of this process can be seen in the Matabeleland Order in Council of 1894 [2]. The charter incorporates the company and confers upon it powers of the nature described above. The Order in Council brings a territory within the limits of these general powers, prescribes definite rules for their exercise, and enables the Secretary of State from time to time to declare that any parts of South Africa south of the Zambesi river, and *under the protection* of His Majesty, shall be included in the limits of the Order.

Spheres of influence.

A sphere of influence would seem to mean an area wherein foreign powers undertake not to attempt to acquire influence or territory by treaty or annexation. Such a mode of dealing is illustrated by the seventh Article of the Anglo-German Agreement of 1890.

Anglo-German agreement.

'The two powers engage that neither will interfere with any sphere of influence assigned to the other by Articles 1 to 4. One power will not in the sphere of the other make acquisitions, conclude treaties, assign sovereign rights or protectorates, or hinder the extension of influence of the other.

'It is understood that no companies nor individuals subject to one power can exercise sovereign rights in a sphere assigned to the other, except with the assent of the latter.'

A sphere of influence is therefore constituted by treaty arrangements with powers outside the area concerned.

Shortly after the making of this treaty Queen Victoria by Order in Council placed the South African sphere of influence under the government of the High Commissioner for South African affairs [3]. We see here the process by

[1] London Gazette, Dec. 20, 1889. [2] July 18, 1894.

[3] Order in Council, May 9, 1891. The Order recites the fact that the territories dealt with are under the protection of Her Majesty, that she

which a sphere of influence may pass into a protectorate, the government of which is provided in the words of the Order.

'In the exercise of the powers and authorities hereby conferred upon him, the High Commissioner may among other things from time to time by proclamation provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of all persons within the limits of this Order, including the prohibition and punishment of all acts tending to disturb the public peace.'

Territories leased to the Crown.

I have called attention to somewhat anomalous temporary rights which are enjoyed by the Crown in Cyprus, Weihaiwei, and the district of Kowloon. These territories are, however, under the definite and exclusive government of the Colonial Office, while the British use and occupation of them continues.

Egypt.

Egypt and the Soudan present aspects of British influence and control of a character too complicated and too much involved in political and international relations to be suitable for discussion here. But they cannot be passed over.

Egypt is nominally governed by the Khedive and his ministers, under the suzerainty of the Sultan: but under what are known as the Capitulations a right to the administration of their own civil and criminal law by their own Consuls is enjoyed by the subjects of about fifteen foreign states[1], while the economic difficulties into which Egypt was plunged under Ismail Pasha brought about an international control of Egyptian finance[2]. Two of the great powers, England and France, have long been regarded as entitled to a preponderant voice in the affairs of Egypt, but owing to the course of events in 1882 England was compelled to intervene with a military force, and the armed occupation of Egypt by the forces

has power and jurisdiction in the same by treaty, grant, usage, sufferance and other lawful means, and alleges itself to be made by virtue and in exercise of the powers by the Foreign Jurisdiction Act *or otherwise* in Her Majesty vested. But the Order goes a long way beyond any powers conferred by the Foreign Jurisdiction Act.

[1] Milner, England in Egypt, ch. iv.

[2] Lord Cromer, Modern Egypt, vol. i, ch. x. Milner, England in Egypt, ch. viii.

of this country has continued ever since. The presence of British troops has given force to British advice administered by the Consul-General and a staff of advisers assigned to the various departments of Egyptian Government. Under this strange system of government by advice from persons who were not, strictly speaking, officers of the Egyptian State, with no clear certainty as to what would happen if the advice was not taken, but under the general impression that it had better be followed, Egypt has thriven in almost everything that concerns a nation's welfare.

Finally, in 1904, a Convention with France was signed in which, while the British Government declared that 'they have no intention of altering the political status of Egypt,' the Government of the French Republic declared 'that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British Occupation or in any other manner[1].'

It would seem that the relation of Egypt to this country is that of an ill-defined and avowedly temporary protectorate.

The Soudan.

That of the Soudan is more distinct. The Soudan was abandoned, and ceased to be a part of the Ottoman Empire after the death of Gordon and the fall of Khartoum. It was reconquered by the arms and at the cost of Great Britain and Egypt. Shortly after the conquest Lord Cromer announced at Omdurman to the assembled Sheikhs that they would henceforth be governed by the Queen of England and the Khedive of Egypt[2]: and an agreement was soon after signed between the representatives of England and Egypt providing for the government of the Soudan. The Governor-General is appointed by the Khedive on the advice of the British Government; his proclamations have the force of law; no foreign consul may reside in the country without our consent, and thus the tangle of the Capitulations was swept away. Egypt has been called the Land of Paradox, and her relations with England during the last thirty years have the elements of comedy, of tragedy, and of romance. The last two are prominent in the history of the Soudan.

[1] Lord Cromer, Modern Egypt, ii. 391.

[2] Ibid., 115–8.

CHAPTER VI

THE CROWN AND FOREIGN RELATIONS

Representative character of the Crown.

FOR external purposes the Crown represents the community. No person or body save the King, by his ministers or his accredited representatives, can deal with a foreign state so as to acquire rights or incur liabilities on behalf of the community at large.

The prerogative of the Crown in this respect is exercised, subject always to the collective responsibility of the Cabinet, through one of His Majesty's Principal Secretaries of State, to whom is entrusted the business of communicating with the representatives of foreign states in this country, and with our own representatives in other communities.

§ 1. *The Foreign Office.*

The staff of the Foreign Office.

The Secretary of State for Foreign Affairs is assisted by two Under Secretaries of State, one of whom is political, the other permanent; three assistant Under Secretaries, a Librarian, a head of the Treaty Department, and a staff of clerks [1].

Its procedure.

The Secretary of State has certain formal duties, such as the presentation of the representatives of other powers to the Sovereign: he is also the channel of communication between individuals or departments of government and foreign countries in any matter in which the intervention of a foreign government may be sought; but the most serious part of his business consists in framing and carrying out a policy for this country in relation to other countries. For this last purpose he must be in constant communication with the representatives of foreign powers in this country, and with our diplomatic agents abroad,

[1] Foreign Office Guide, 4, 5.

who are responsible to him for their action, as he is responsible to the Cabinet and to Parliament. All communications which are of sufficient importance to go before the Secretary of State fall into one of two groups.

When letters or dispatches of an ordinary character arrive they are sent by one of the clerks to one of the Under Secretaries, he reads and sends them on to the Secretary of State, who reads them, gives instructions, and returns them. The Under Secretary, having studied the instructions, sends the papers to the clerk into whose department they fall, who registers them and carries out the instructions given.

But important dispatches and correspondence with our ministers abroad do not end here. The dispatches and, if necessary, the drafts of answers are sent, first to the permanent Under Secretary, then to the Prime Minister, then to the King, and, as we have seen, time must be given to the Sovereign to form an opinion upon important dispatches before they are sent; lastly, they are circulated among the members of the Cabinet. The Library of the Foreign Office is the ultimate depository of the transactions of the Office[1].

§ 2. *Diplomatic Agents and Consuls.*

But it is obvious that important and pressing matters cannot be dealt with wholly by correspondence. So in all foreign civilized states of any importance the interests of this country are superintended by two classes of agents resident on the spot: diplomatic agents and consuls.

Diplomatic agents.

A diplomatic agent may, in point of dignity, be an ambassador or merely a *chargé d'affaires*. He may be permanently accredited to the Court of a foreign country, or he may be dispatched on a special mission: but in all cases he represents the state from which he is sent.

One state may refuse to receive or retain the diplomatic agent of another, either because it desires to break off all friendly relations and enter upon a state of war, or because

[1] Report of Committee on Diplomatic Service, Parliamentary Papers, 1861, vol. vi, p. 75. Evidence of Mr. Hammond.

the individual agent is personally disagreeable, or politically hostile to it, or because his reception would amount to an admission of claims which it does not recognize, as in the case of the Papal legates of days before the English Reformation.

Forms of appointment.

The forms of appointment and the immunities of diplomatic agents may be properly dealt with here. The forms vary. Ambassadors and envoys plenipotentiary receive powers to treat and negotiate under the Great Seal, and also a letter of credence, under the sign manual, to the Sovereign or President of the country to which they are sent. A *chargé d'affaires* has no such ample powers, and his letter of credence is signed by the Secretary of State [1].

Immunities,

Persons thus accredited either by the King of this country to other states, or by other states to the King, enjoy certain immunities from the law of the land in which they reside.

and the reason for them.

It is sometimes said that such immunities, like privilege of Parliament, exist because they are necessary for the purpose of enabling those who enjoy them to discharge their duties without hindrance; but the more correct view seems to be that they rest on the representative character of the diplomatic agent. The immunities which would be due to his Sovereign are due to him. In one respect he is not merely free from, but outside of, the law of the state to which he is accredited. His children born there are not subjects of that state, but follow the nationality of their father [2].

From criminal

Besides this he is exempt from its criminal jurisdiction, though exceptions may be noted in which an ambassador, having taken part in conspiracies against the state to which he is accredited, has been arrested and kept in custody [3].

He is also exempt from its civil jurisdiction. The limits

[1] For forms of power to treat and negotiate, and of letters of credence, see Appendix.

[2] Hall, International Law, 5th ed., p. 174.

[3] Ibid., p. 172, and see cases there cited. Martin, Causes Célèbres, i. 103.

and civil jurisdiction,

of this exemption differ in different countries; so does the authority for the exemption. In some it rests on general principles of international law embodied in the common law of the land[1]. In some it is based on the same principles affirmed, as such, in a civil code. In our own country the exemption is a specific piece of Statute law making no pretension to embody any general principles, but passed admittedly to prevent the recurrence of a scandal.

in England.

The Act 7 Anne, c. 12, after reciting the insults offered to 'his excellency Andrew Artemonowitz Matneof, ambassador extraordinary of his Czarish Majesty, Emperor of Russia,' who had been pulled out of his coach and detained, goes on to enact that

Statute Law.

'To prevent the like insolences for the future be it further declared by the authority aforesaid that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambassador or other publick minister of any foreign prince or state authorized and received as such by Her Majesty her heirs or successors, or the domestick or domestick servant of any such ambassador or other publick minister may be arrested or imprisoned or his or their goods or chattels may be distrained seized or attached shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatever.'

General principle.

But behind this enactment lies a general principle accepted by our Courts and reaching far beyond the exemption from civil process of an ambassador and his suite. This is laid down in the case of the *Parlement Belge.*

'We are of opinion,' said Brett J., delivering the judgment of the Court of Appeal, 'that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or *over the public property of any other*

[1] So I understand Mr. Hall's description of the rule laid down by the French Courts, p. 173.

state which is destined to its public use, or over the property of any ambassador, though such sovereign, property, or ambassador be within its territory, and therefore, but for the common agreement, subject to its jurisdiction[1].'

Suite and servants.

The civil immunity extends to the suite and servants of a diplomatic agent, not apparently in their own right, but because of their necessity to the dignity or the duties of their master[2]. The question of the immunity of such persons from criminal jurisdiction is not settled. In England they are held liable to the criminal law. In other countries the difficulty seems to be evaded by the readiness of the master to hand over the delinquent servant to justice[3].

House.

The territorial immunities of the house of a diplomatic agent are also doubtful. Where the agent himself is liable to be arrested on the grounds stated above, the privileges of his house end with his own; where a servant or member of his suite has committed an offence against the criminal law, it would seem that in England and France it is the practice to disregard the immunity of the house for the purpose of making the arrest[4]. When the offence has been committed by a subject of the country to which the agent is accredited, it is obviously right that the law should take its course. In short, the house of a foreign minister does not appear to be, like a public ship in a foreign harbour, extra territorial, but merely exempt from jurisdiction so far as is necessary to support the dignity of the minister and to enable him properly to discharge his duties.

A consul,

A consul does not represent the state in its external relations to other states, unless, as sometimes happens, he is clothed with a diplomatic character in addition to his consular functions. Otherwise he is merely employed to attend to the interests of British subjects during their stay in the country wherein he is engaged to reside.

[1] The *Parlement Belge*, 5 P. D. 197. See also *Mighell* v. *Sultan of Johore* (1894) 1 Q. B. C. A. 149.

[2] If the servant of an ambassador engage in trade he is liable under the bankruptcy laws. 7 Anne, c. 12, s. 5.

[3] Hall, ed. 5, p. 179.

[4] Ibid., pp. 180–4.

his duties, His business is to issue or affix a *visa* to passports for British subjects when needed, to authenticate documents, and births and deaths, and to take statements from captains of British ships as to injuries sustained at sea. He receives complaints of British subjects as to any injustice inflicted, and communicates with the local authorities, he administers the property of such as die in the country of his residence, and arbitrates on disputes which they may bring before him; he collects information, commercial and economical, and forwards it to the Foreign Office.

how far judicial. Apart from Statute or Order in Council requiring a consul to exercise a jurisdiction possessed by the Crown in a foreign land, the consular office has no inherent judicial power. Such as is exercised by consuls may best be dealt with under the head of foreign jurisdictions.

A consul is appointed by commission or patent from the government of the country which employs him. This needs to be confirmed by an *exequatur*, a document issued by the government of the country wherein the consul's duties are to be discharged. In England such documents are issued from the Foreign Office. The *exequatur* may be refused or withdrawn if the consul should be personally unacceptable or should misconduct himself in the exercise of his office.

Consular immunities. The immunities of a consul are of somewhat uncertain extent. Practically he is entitled to have his archives and other official documents treated as inviolable, and to be exempt from such personal liabilities (such as serving on juries or in the militia) as would interfere with the continuous discharge of his duties[1].

§ 3. *War, Peace, and Treaties.*

The prerogative of making war: The King, acting on the advice of his Ministers, makes war and peace. The House of Commons may refuse supplies for a war, or either House may express its disapproval by resolutions condemnatory of the ministerial policy, or

[1] For a fuller account of consular duties and privileges, see Hall, International Law, pp. 316–20, and Foreign Jurisdiction of the Crown, p. 16.

by address to the Crown, or by making the position of the ministry in other ways untenable: but Parliament has no direct means either of bringing about a war or of bringing a war to an end.

how far controlled by Parliament.

Nor does a decided expression of opinion by the House of Commons always overbear the policy of a ministry. In 1782 a resolution of the House of Commons, followed by an address to the Crown, caused Lord North to take steps to end the war with the American colonies[1]; but in 1857 a resolution of the same House, condemnatory of the war with China, caused Lord Palmerston to appeal to the country, with the result that the electors affirmed his policy and returned a majority of his supporters to Parliament.

Peace and treaties.

The prerogative of the Crown in making peace is so much involved in questions as to the prerogative in making treaties that the two must be dealt with together. Parliament has only indirect means of bringing a war to a close, but it is hard to conceive of a peace concluded simply by a cessation of hostilities and mutual assurances of amity. Some engagements must be entered into; liabilities incurred; territory acquired or ceded; and a question arises in this form: No one but the King can bind the community by treaty, but can he always do so without the co-operation of Parliament? It would seem to follow from the general principles of our constitution that a treaty which lays a pecuniary burden on the people or which alters the law of the land needs Parliamentary sanction. If it were not so the King, in virtue of this prerogative, might indirectly tax or legislate without consent of Parliament.

Limits on power to make treaties.

Questions arise, however, in relation to this prerogative which need fuller consideration. Can the King cede territory by treaty without consent of Parliament, or can he confer immunities on foreigners, or affect the rights of private individuals except with such consent?

The cession of territory is a matter 'in regard to which the practice of consulting Parliament has varied widely

[1] Cobbett, Parl. Hist., xxii, pp. 1084, 1214.

Cession of territory:

from time to time[1]': but the tendency has been undoubtedly in the direction of obtaining the sanction of Parliament more regularly, and not merely by an address to the Crown, or a vote signifying approval, but making the treaty or convention conditional on the approval of Parliament and by the embodiment of the provisions relating to the cession in the schedule of a Statute.

In the eighteenth century the exercise by the Crown of this prerogative was unquestioned, but ministers might suffer if a mistake was made. Blackstone says:—

'A king may make a treaty with a foreign state which shall irrevocably bind the nation; and yet when such treaties have been judged pernicious, impeachments have pursued those ministers by whose agency or advice they were concluded[2].'

in 1783,

The peace of 1783 involved not merely the cession of Minorca and Florida, but the surrender of the sovereignty over the American colonies to those who had, up to that time, been subjects of the Crown. No statutory sanction was obtained for these cessions, beyond an Act[3] which empowered the King to conclude a peace or truce with the Colonies, and for that purpose to annul or suspend any Acts of Parliament which related to those colonies. Nothing is said of surrender of sovereignty or cession of territory. In the Addresses, moved in the two Houses, of thanks to the King for the conclusion of peace with France, Spain, and the American colonies, Lord Loughborough expressed himself as convinced that the King had exceeded his prerogative by the cessions of territory involved[4]; but he was flatly contradicted by Lord Thurlow. No one in either House followed up the discussion on these lines, nor do the noble Lords themselves appear to have been much impressed with the force of their own arguments, which were designed for party ends.

The same sort of question was raised when the sove-

[1] Lord Percy, moving the second reading of the Anglo-French Convention Bill. Hansard, 4th series, vol. cxxxv, p. 502.

[2] Blackstone, Comm. i. c. 7, p. 251.

[3] Geo. III, c. 46.

[4] Parl. Hist., vol. xxiii, p. 430.

reignty of the Orange Free State was abandoned in 1854[1]: but it should be noted that the Attorney-General, Sir A. Cockburn, expressly defended the transaction on the ground that the territory in question had been acquired by conquest. He drew a distinction between a colony so acquired and one acquired by settlement, or, as he called it, 'by occupancy.' Under such circumstances

in 1854.

Suggested limitations of prerogative.

'he was aware that there existed considerable difference of opinion as to whether the Crown had the power of getting rid of those territories otherwise than by an Act of the Legislature. On the other hand, with regard to colonies acquired by conquest and by cession, it was clear that the Crown had an undisputed and absolute sovereignty over them, and that the persons there did not acquire any right to the laws and institutions of this country.'

The cession of sovereignty to the Orange Free State took place without further question, but the limits on the prerogative in this matter have been since then from time to time considered in Parliament or discussed by eminent legal authorities. Starting from the point indicated by Sir A. Cockburn, and assuming that the King may cede territory acquired by conquest or cession, it has been maintained that his powers may be limited even in the case of such territories if they have been the subject of legislation by the Imperial Parliament, or if the King, by his own act, in conferring upon them representative institutions, has put it out of his power to legislate by Order in Council. The prerogative of cession, if this view is correct, would be coextensive with the right to legislate by Order in Council.

There seems, however, to be a consensus of opinion that at the close of a war, and for the purpose of concluding a peace, the prerogative of cession is wider than it would be in time of peace.

We must look for authority to judicial decision and the practice of the State, and this practice is guided, we must presume, by the opinions of the legal advisers of the Crown.

Of judicial opinion there is but little. In 1876 a case

[1] Hansard, 3rd Series, vol. cxxxiii, p. 82.

Judicial decision.

came before the Judicial Committee of the Privy Council on appeal from the High Court of Bombay. That Court had held, for the purposes of a judgment in a particular case, that territory had been ceded, and that the Crown had no power to make such cession in time of peace without consent of Parliament. The Judicial Committee reversed the judgment of the Indian Court, and while holding that what had taken place did not amount to a cession, expressly stated that their Lordships entertained grave doubts 'as to the soundness of the general abstract doctrine laid down' on this question of the prerogative of cession [1].

It should be observed that this is an Indian Appeal, and I believe that there is a mass of precedent for cession of territory in our Indian Empire, to which no Parliamentary assent was given, ranging over a long period of years and reaching comparatively recent times. This seems to show that we cannot draw precedents from this portion of the King's dominions.

Practice of State.

There remains the practice of the State, and here we find two remarkable modern instances of the submission to Parliament of the terms of a treaty already negotiated by the Ministers of the Crown.

Case of Heligoland.

In 1890 Queen Victoria, in concluding a treaty with the Emperor of Germany, which provided among other things for the cession of Heligoland to the Emperor [2], was advised by her Ministers to make the cession conditional on the approval of Parliament. This invitation to Parliament to share in the exercise of the prerogative rights of the Crown, and therewith to assume the responsibilities of the Executive, was much criticized in debate. The views of the Opposition were thus forcibly stated by Mr. Gladstone:—

'There is one thing which I think is still higher than the *dicta* of legal authorities, in this important question, and it is our long, uniform, and unbroken course of practice. It is one thing to stand upon the opinion of an ingenious or even a

[1] *Damodhar Gordhan* v. *Deoram Kangi*, i. App. Ca. 352. [2] 53 & 54 Vict. c. 32.

learned man: it is another thing to cite the authority of an entire State, signified in practical conclusions, after debate and discussion in every possible form, all bearing in one direction, and stamped with one and the same character. It is hardly possible, I believe, to conceive any kind of territory—colonies acquired by conquest, colonies acquired by settlement, with representative institutions or without representative institutions—it is not possible to point out any class of territory where you cannot show cases of cession by the Crown without the authority of Parliament[1].'

Mr. Gladstone was doubtless right in his statement as to the facts of cession, though 'debate and discussion' can hardly be said to have been as exhaustive as he described them. Mr. Balfour spoke of the question as being 'in a nebulous condition,' but asserted that 'eminent legal authorities consulted specifically' had maintained the necessity for Parliamentary assent. Mr. Goschen admitted that the course taken by the Government was a departure from practice, and did not involve the proposition 'that the assent of Parliament is indispensable to treaty making or even to a cession of territory.'

The Anglo-French Convention.

The course taken in 1890 was followed in the case of the Anglo-French Convention in 1904, in which various points at issue between the two countries were settled on terms which involved cessions of territory to France. No question was raised in either House of Parliament, except as to the expediency of the terms, when the Bill which embodied the Convention was under discussion.

We seem, then, to be drawn to this conclusion, that apart from precedents relating to Indian territory, it has of recent years been thought desirable, if not necessary, that the consent of Parliament should be given to the cession of territory in time of peace. Cessions made at the conclusion of peace or in course of a war, or of lands acquired by conquest or cession, for which Parliament has not legislated, and for which the King has not by his own act deprived himself of the power of legislating by Order in

[1] Hansard, vol. cccxlvii, p. 764.

Council, would seem to stand on a different footing. We can but follow the practice of the State, and this must be taken to accord with the best legal advice which the King's Ministers can obtain.

But the expediency of embodying treaties of this character in Bills submitted to Parliament is still an open question. Parliament can always express its disapproval of a treaty, or Ministers can, if they are strong enough in Parliamentary support, obtain an expression of approval. It may be doubted whether Ministers ought not to be prepared to accept the responsibility of the exercise of the treaty-making power by the Crown, and whether the ratification of a treaty should be dependent upon the goodwill of a popular assembly.

In support of the view that such treaties should be submitted to Parliament is the fact that cession of territory necessarily affects the rights and duties of the dwellers on the ceded territory. It affects their nationality either by the extinction of the state under whose sovereignty they lived, or by the transfer of that portion of the country in which they lived to another sovereign. The first case is illustrated by the transformation of the Orange Free State, an independent political society, into the Orange River Colony, a part of the King's dominions. The second by the transfer of Heligoland from England to Germany.

In the first case it is usual to allow those who would avoid their new nationality to leave the conquered state[1]: in the second case provision may be made by treaty or otherwise for those who desire it to retain their old nationality. But in all such cases, as it would seem, specific provision must be made if the effect of cession in changing the nationality of the dwellers on the ceded lands is to be averted.

And the King by cession of territory can not only change the nationality of his subjects, but can affect in some

[1] The case of a foreigner, naturalized in the conquered state, who has not lost his own nationality, can be met by permission to declare an intention to retain that nationality, to revert to his domicile of origin, and remain, a foreigner, in the conquered state.

respects their civil rights. Thus, if a question was in issue between an inhabitant of the ceded territory and his Government in respect to rights over land in that territory, the remedy of the inhabitant, if transferred at all, would be transferred from the old to the new sovereign[1]. But a demand in the nature of a money claim against the old Government, even if it were a part of the public debt, could only be transferred to the new Government by the terms of a treaty, or by a novation involving the action of all three parties, the two Governments and the claimant.

Charges on subject.

The assumption by this Government of any portion of the public debt of a country acquired by cession would lay a charge, or might do so, on the subjects of this country, and a definite and well-recognized limit on the treaty-making power of the Crown is found in the rule above mentioned, that where a treaty involves a charge upon the people, or a change in the general law of the land, it may be made, but cannot be carried into effect without the consent of Parliament.

Changes in law.

Treaties which thus affect the rights of the King's subjects are made subject to the approval of Parliament, and are submitted for its approval before ratification, or ratified under condition.

Such are treaties of commerce which might require a change in the character or the amount of duties charged on exported or imported goods: or extradition treaties which confer on the executive a power to seize, take up, and hand over to a foreign state persons who have committed crime there and taken refuge here[2].

Grant of immunities.

The right of the Crown, by treaty merely, to extend to foreigners immunities from the law of the land, which would affect the private rights of citizens, was raised in the case of the *Parlement Belge*[3].

It was alleged in that case that Queen Victoria had,

[1] It does not follow that they would be transferred at all. *Cook* v. *Sprigg*, 1899, A.C. 57.

[2] Forsyth, Cases and Opinions in Constitutional Law, 369.

[3] L. R. 4 P. D. 154-5.

by convention with the King of the Belgians, conferred upon a ship, assumed by the Court to be a private ship engaged in trade, the immunities of a public ship, or ship of war, so as to disentitle a British subject from proceeding against her for injuries sustained in a collision. Sir Robert Phillimore held that the treaty-making prerogative did not extend this length, and gave judgment against the ship [1]. His decision was reversed by the Court of Appeal [2], but on a different ground, namely, that the *Parlement Belge was* a public ship, although not a ship of war, being used for a national purpose, the transmission of mails. The Court carefully abstained from expressing any opinion on the point on which Sir Robert Phillimore mainly rested his judgment.

The same question was raised, and evaded, in *Walker* v. *Baird* [3]. The working of a lobster-factory on the coast of Newfoundland was stopped by an officer entrusted with the enforcement of an agreement made between the Crown and the Government of France. The owner of the factory brought an action, and it was held to be no defence to allege that the conduct of the officer was 'an act of state.' Whether or no it could be justified by the treaty-making power of the Crown was discussed but not settled, inasmuch as the statement of defence assumed that the mere allegation that the acts were done in pursuance of a treaty took the matter out of the cognizance of the Court. This was not the view of the Judicial Committee. It was admitted that the Crown

'could not sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the terms of a treaty.'

'Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in cases akin to a treaty of peace, or whether in both or either of those cases interference with private rights can be authorized otherwise than by the Legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion.'

[1] L. R. 4 P. D. 154. [2] L. R. 5 P. D. 197. [3] [1892] A. C. 491.

§ 4. *Foreign Jurisdiction.*

The King can 'by treaty, capitulation, grant, usage, sufferance, and other lawful means,' exercise jurisdiction within divers foreign countries. The history of foreign jurisdiction of this nature begins with the Levant Company, which obtained a charter in 1581, renewed in 1606 and 1662, conferring power to appoint consuls who should administer justice between merchants 'in all places in the dominion of the Grand Seignior and in other Levant Seas [1].' By capitulations made with the Ottoman Porte suits between subjects of the Crown were, throughout the territories specified in the charter, to be decided by the judges therein described, and not by the local Courts.

Usage appears to have extended this jurisdiction from cases in which both parties were British subjects, to cases in which the defendant only was a British subject, and to cases of crime committed by British subjects.

When the Levant Company ceased to exist it became necessary to provide for the exercise of this jurisdiction otherwise than by the Company's charter, and perhaps also some doubts had arisen as to the power of the Crown to create such jurisdictions by mere exercise of the prerogative [2]. In 1843 began the series of Foreign Jurisdiction Acts, which are now consolidated in the Act of 1890 (53 & 54 Vict. c. 37). The purport of these Acts has been to give to the Crown full power to provide by Order in Council for the exercise of such jurisdictions, wherever 'by treaty, capitulation, grant, usage, sufferance, and other lawful means,' they have been acquired or have come into existence [3].

Statutes on subject

[1] See Tarring, British Consular Jurisdiction in the East, p. 9.

[2] Hall, Foreign Jurisdiction of the British Crown, p. 9.

[3] For an account of the history of consular jurisdiction, and of the law (Statutes, Orders in Council, and decided cases) down to 1887, see Tarring, Consular Jurisdiction in the East. See also Hall, Foreign Jurisdiction of the British Crown, Part iii, and for the most recent statements of the law, Jenkyns, British Rule and Jurisdiction beyond the Seas (1902), and Ilbert, Government of India, ch. v.

Character of jurisdictions.

Foreign jurisdictions exercised in consular courts exist at the present time (1) in civilized independent states by virtue of express treaty, as in Turkey, Persia, China, and Japan; (2) in protected states with a settled form of government, as in certain protected communities, where the relation of suzerain and dependent state involves such a jurisdiction [1]; (3) in countries with no settled form of government, as in the African protectorates or in the Pacific islands.

Where such a jurisdiction takes its origin from treaty, its extent and the persons over whom it may be exercised must be the matter of express agreement. In the other cases, the exercise of jurisdiction over others than the King's subjects is a question with which I have dealt at sufficient length in the preceding chapter [2].

Process of their creation.

It is enough here to call attention to these foreign or consular jurisdictions, and to point out the three stages by which they come into being:—

(1) The treaty or rule of international law which renders their existence possible;

(2) The Statute which gives and defines the power by which the King creates them;

(3) The Order in Council by which they are in fact created, and their extent prescribed as to the law to be administered and the persons who are to be subject to it.

[1] The jurisdictions exercised in the dependent Indian states do not originate in treaty, but in the relation of suzerain and dependent state; they are the concern of the India Office, and not of the Foreign Office, and however analogous they may be to the matter in the text, they are not 'foreign' or consular jurisdictions.

[2] The subject of Foreign Jurisdiction is treated exhaustively by Mr. Hall, Foreign Jurisdiction of the British Crown.

CHAPTER VII

THE REVENUES OF THE CROWN AND THEIR EXPENDITURE

SECTION I

THE REVENUE [1]

THE revenues of the Crown are not, as the term would seem to imply, an income which the King receives to spend at his pleasure. Here as elsewhere in our Constitution the identification of the Crown as the individual Sovereign with the Crown as the executive government has produced a misleading terminology. The so-called revenues of the Crown are for the most part the sums paid, in various forms, by the people for the maintenance or promotion of the various objects for which the Government exists. The ancient hereditary revenues of the Crown are thrown into the common stock for this purpose. Out of this common stock a sum bearing a very small proportion to the whole, £110,000 out of about £156,000,000, is assigned to the King and Queen to be used at their discretion. The rest goes to satisfy those national objects which cannot be satisfied except by money payments, and is appropriated precisely to these several objects of Parliament, annually in the Appropriation Act, or once for all by permanent Statute.

Sources of Revenue.

The arrangement of the great branches of the revenue in the annual statement of national income and expenditure furnished to Parliament affords the outline which I must follow in the earlier part of this chapter. The taxes are not arranged in their historical order, nor, in the case of

[1] The authorities for this section, apart from the Statute Book, are Dr. Stubbs' Constitutional History, Mr. Dowell's History of Taxation, and the Public Income and Expenditure Return of 1869 [366].

the Excise and Stamp duties, do the terms explain the nature of the taxation involved. But the order and the terms constitute the authorized version, and it is safer to adopt them as they stand.

The sources of revenue are thus arranged (I append the figures for the years ending March 31, 1895 and 1908)[1]:—

		£	£
Tax revenue.	Customs	20,115,000	32,490,000
	Excise	26,050,000	35,720,000
	Estate Duty	. . . .	19,070,000
	Stamps	14,440,000	7,970,000
	Land tax and House duty	2,450,000	2,690,000
	Property and Income tax	15,600,000	32,380,000
Non-Tax revenue.	Post Office	10,760,000	17,880,000
	Telegraph Service	2,580,000	4,420,000
	Crown Lands	410,000	520,000
	Suez Canal Shares and Sundry Loans	412,976	1,190,000
	Miscellaneous	1,865,785	2,208,000
		94,683,761	156,538,000

The first six items in this list represent revenue derived from taxation; the others represent income arising either from business carried on by the Government, or from property or investments.

Some of these sources of revenue have a long and interesting history; some are modern. The Customs and the taxes on land and property are associated, though not in *their present form*, with the great constitutional struggles of the fourteenth and seventeenth centuries. The Crown lands take us back to Saxon times. The Excise and the

[1] There are two points of difference to be noted in these accounts: (1) the account for 1895 represents the revenue as it stood after deductions made, as a payment to local taxation accounts, from customs, excise, and stamp duties. This payment amounted in 1895 to nearly £7,000,000. The account for 1907 represents the revenue without this deduction for payment towards local taxation, which now amounts to more than £11,000,000. (2) In 1895 the estate duties were included in the stamp duties, and produced £10,854,983, out of a total of £16,727,726, of which £2,140,000 went in aid of local taxation.

Post Office mark the beginning of a new financial system under Charles II. The Stamp duties and the Estate duties represent the ingenuity of modern finance. But I will take the taxes in the order in which they are presented to Parliament, and describe so much of the nature of each, and of its history, as may seem important to be set forth.

§ 1. *The Customs.*

Origin of customs.

The liability of imported articles to a charge levied by the King is of very ancient date. The charge seems, in its origin, to have been a re-payment to the King for cost incurred in maintaining the ports and keeping the sea clear of pirates. That it was increased in order to enrich the Crown seems plain from the words of Magna Charta wherein the King promises that he will not levy evil tolls upon merchants. A prise or prisage upon imported wine, duties on imported woad[1], fish, and salt, and an export duty upon wool and leather, appear to have been recognized at the end of the twelfth and throughout the thirteenth century.

The Charter.

The *antiqua custuma*: 1297.

In 1275 there was granted to Edward I, in substitution for the indefinite 'ancient and rightful customs' of the Charter, an export duty of half a mark or 6*s.* 8*d.* on every sack of wool, and on every 300 woolfells, and a mark on every last of leather. These duties were excepted by the King in the *Confirmatio Chartarum* from the renunciation therein made of his right to levy tolls on merchandise. They were henceforth known as the *antiqua custuma*.

The *nova custuma*.

The *nova custuma*, first imposed by Edward I in 1303, and confirmed after some vicissitudes in the Statute of Staples in 1353[2], had a different origin, and ostensibly a different incidence, since it was a charge upon foreign merchants. It was a charge of 10*d.* on the sack of wool and on every 300 woolfells exported by alien buyers, and of 3*d.* in the pound on all goods imported. The *antiqua custuma* and the *nova custuma*, together with the Prisage and Butlerage upon wines imported by English and foreign

[1] Madox, Exchequer, xviii. § 4. [2] 27 Ed. III, st. 2.

merchants, remained a part of the hereditary revenues of the Crown until the two customs duties were absorbed in the grants of tunnage and poundage made to the Crown at the commencement of each reign. Prisage and Butlerage were excepted from the consolidation of the customs duties at the beginning of the reign of Charles II; their proceeds were granted by the Crown to subjects, and they were commuted in 1803 for annuities charged on the Consolidated Fund, and payable to the persons entitled to exact the charge at the ports of England and Wales.

Prisage and Butlerage.

Tunnage and Poundage.

A grant of Tunnage and Poundage meant a duty on exports and imports distinguished from the above-mentioned duties by the name of Subsidy. We must be careful to bear in mind the two senses in which this term is used as applied to direct, and to indirect taxation; in both it means a specific Parliamentary grant as opposed to the hereditary revenues of the Crown, but in the department of direct taxation 'subsidy' has a technical meaning to be explained hereafter. The subsidy of Tunnage and Poundage is kept apart as an item of revenue from the ancient and from the new or small customs, and the controversies to which it gave rise had a different history.

Export duty on wool.

Throughout the greater part of the fourteenth century the King claimed the right to levy a toll upon exported wool, woolfells, or leather, over and above the customs above mentioned, and to make separate agreements with merchants for a payment on the tun of imported wine, and the pound of imported goods. This right was never admitted by Parliament, and at last, in 1371, it seemed as though the controversy was closed.

Uncertainty as to import duties.

The settlement as to impost on wool was embodied in a Statute whereby the King was precluded from taking more than the ancient customs without consent of Parliament. In the matter of Tunnage and Poundage, Parliament seems to have thought that it had done enough in making an express grant of 2*s.* on the tun of wine, and 6*d.* on the pound of exported and imported goods, except wool and skins. The King was not expressly precluded from raising these rates, and the door was thus left open for an arbitrary

increase in the royal revenues. The advantage taken of this opening by the Tudor queens and James I is commemorated in the arguments in Bate's case [1].

Export and import duties, 1376–1660.

But from 1376 down to the re-settlement of the Revenue at the Restoration, tunnage and poundage at various rates was granted either for a term of years or for the life of the King, and what we now call by the general term customs, appears to fall under three heads.

(1) The ancient customs, together with prisage and butlerage.

(2) The subsidy on exported wool.

(3) The duty, at a rate fixed by Parliament, on the tun of imported wine, and the pound of imported goods.

These last two Parliament was careful to keep in its hands; the subsidy by the provisions of the Act of 1371 [2], tunnage and poundage by the terminable nature of the grant. But this was an insufficient security. The Tudor queens laid fresh imposts on cloth and sweet wines without consulting Parliament; and in Mary's reign the rating of merchandise upon the value sworn to by the merchant was abandoned and the values at which goods of different sorts should be rated was set forth in a Book of Rates [3].

The Tudor impositions.

The Book of Rates.

James I increased by an act of prerogative the statutory poundage upon certain articles of commerce and modified the Book of Rates after consultation with the chief merchants, and without reference to Parliament. The resistance of Bate to the payment of the added duty on currants, the decision of the Court of Exchequer in favour of the Crown, the exhaustive discussion in the House of Commons in 1610, and the final limitation of the royal prerogative in this respect by the Long Parliament, are matters with which I have dealt elsewhere [4].

Bate's case.

Consolidation of 1660.

In 1660 the customs were consolidated, and the rates at which commodities should be charged were classified in the Statute which granted this portion of the revenue to the Crown. The old distinctions of ancient and new

[1] Part i, Parliament, ix. 83.
[2] 45 Ed. III, c. 4.
[3] Dowell. History of Taxation, i. 165.
[4] Part i, Parliament, ix. § 3.

customs, subsidies and imposts, were wiped out, and rates were classified under four heads:—

(1) The tunnage on wine.

(2) The poundage on imported goods.

(3) The poundage on exported goods.

(4) The duty on woollen cloth [1].

These were granted to Charles II for life, and in like manner to James II.

New duties were imposed in the reign of William and Mary, and in 1698 an increased percentage was charged upon the articles specified in the Act of 1660, under the title of the New Subsidy. Further percentages were charged during the war of the Spanish succession in 1703 and 1704, during the war of the Austrian succession in 1747, and during the Seven Years' war in 1759: but the export duty on woollen manufactures was repealed in 1700.

Further complications.

Thus our revenue laws had become extremely complex when a fresh consolidation of customs was carried into effect by Mr. Pitt in 1787 [2]. Hitherto the complication of the customs duties had extended not only to their collection but to their expenditure: the usual practice of the legislature was to appropriate each duty, when imposed, to a specific service, and thus it came about that while some few duties were left unappropriated and could be used by Parliament for any service of the year, others were assigned, as they came in, to funds made up from various sources and devoted to some public purpose, while others again went directly to meet specified charges [3]. The Commissioners of Public Accounts [4] recommended that the customs should be simplified; the entire revenue thence arising was henceforth paid into one Fund, called the Consolidated Fund.

Consolidation of 1787.

Since 1787 new tariffs have been enacted, and new consolidation Acts passed. The principles on which our modern financial policy has in this respect been based, are mainly

Modern principles.

[1] 12 Car. II, c. 4.

[2] 27 Geo. III, c. 13, s. 52.

[3] Thirteenth Report of the Commissioners of Public Accounts, p. 51.

[4] Appointed under 20 Geo. III. c. 54.

two: one is to simplify and cheapen the collection of the revenue by reducing the number of commodities on which duty is chargeable: the other is to encourage our manufacturing interest by the abandonment of taxes on raw material imported into this country for the purposes of manufacture.

Reduction of duty-paying articles.

The simplification may be said to have been initiated by Sir Robert Peel. When he came into office in 1842, the customs included about 1,200 articles. In one year, 1845, he struck 450 off the list[1]. The reduction has gone on almost continuously to the present day. For a while during the South African war recourse was had to new sources of revenue, but these are now abandoned, and great financial authorities begin to doubt whether we have not unduly narrowed the basis of our revenue from this source. Be this as it may, the number of duty-paying articles has shrunk from 1,200 in 1842 to about fifteen at the present time.

§ 2. *The Excise.*

The Excise under the Commonwealth.

Duties on articles of consumption produced at home were first introduced under the Commonwealth. After some murmuring at the novelty of the tax, and at its incidence upon things of daily use, it was accepted as both productive and fair. The duties at that time extended not only to articles produced at home, but to certain articles imported from abroad, which were thus taxed twice over, first at the ports in accordance with the Book of Rates, and again while in the hands of the merchant on their way to the consumer.

Resettlement at the Restoration.

When the revenue was settled on the Restoration of Charles II, it was necessary to provide the King with a source of income which should meet the loss occasioned by the abolition of military tenures.

It was impossible to devise a tax which, without unfairness to individuals, should fall upon the lands heretofore held in chivalry. A general land-tax would have borne hardly

[1] 8 & 9 Vict. c. 12.

on those who had not been tenants-in-chief, or tenants in chivalry: a tax limited to lands so held would not have been fair to purchasers during the Commonwealth who had bought lands which they supposed to have been for ever freed from liabilities of this nature.

The hereditary Excise,

An excise duty on beer and other liquors, although it did not correspond either in character or incidence to the source of revenue which was abandoned, seemed to be a just and reasonable method of raising money: it was one to which the taxpayer had become accustomed in the days of the Commonwealth. An excise duty was therefore imposed by 12 Car. II, c. 24, and was made a part of the hereditary revenues of the Crown. A duty similar in character and amount was imposed at the same time and granted to the Crown for life.

But after the Revolution the King was no longer entrusted with the maintenance of all the services of the country. He was then granted only such a sum as would suffice to maintain the Civil List; and the hereditary excise, with the other hereditary revenues, diminished *pro tanto* the need of a supplementary grant from Parliament to make up the amount at which the annual cost of the Civil Service was estimated. At the commencement of Anne's reign, the right of the Crown to alienate the hereditary revenues was limited by the Statute which granted a Civil List to the Queen[1].

Commuted,

In 1736 a portion of this income was commuted by Parliament for an annual payment to the Crown of £70,000. In 1787 by the Consolidated Fund Act, already referred to, all existing excise duties were repealed, and therewith the hereditary excise. New duties were imposed of a similar character, and their produce carried to the Consolidated Fund, but a calculation was made every year of the amount which the hereditary excise would have produced.

Surrendered,

Without going into the detail of the Statutes on the subject it is enough to say that, although each successive sovereign since George III has surrendered his right to the

[1] Anne, st. i. c. 7, s. 3, 7.

hereditary revenues in consideration of a fixed annual payment, the hereditary rights of the Crown are kept alive, while provision is made that the income of which they are the subject should, as in the case of Crown lands, go to the Consolidated Fund, or, as in the case of the hereditary excise, should not be raised at all[1]. Extinguished.

The articles on which excise duties are now levied are not numerous, but include beer and spirits which, together, produce more than a quarter of the national revenue. But I would point out some extension of the term beyond its original meaning of a tax upon articles of use or consumption produced at home. Use of the term Excise.

The term was used to excite popular feeling against a very useful measure, the celebrated Excise Bill of Sir Robert Walpole. His scheme was nothing more than a mode of collecting the customs on wine and tobacco which had been already applied to tea, coffee, and cocoa. Instead of taking the whole duty upon the landing of the goods, Walpole proposed to take a small duty upon unshipment, after payment of which the goods were required to be warehoused. If they were exported thence, no further duty was demanded; if taken out for consumption at home, a sum which made up the full duty was to be paid, and this duty was to be collected by the officers of Excise. This term, which had reference solely to the mode of collection, was used by the leaders of an unscrupulous opposition as describing the character of the tax. People were told that a multitude of Excise officers would penetrate every household and take toll of every article of use or consumption. The clamour raised determined Walpole to withdraw a measure the only fault of which was that it was called by an unpopular name. The Excise Bill of Walpole.

But the modern use of the term Excise is largely extended beyond its original meaning. The tax does not Excise licences.

[1] These duties on ale, beer, and cider, were dealt with by 11 Geo. IV and 1 Will. IV, c. 51, but in the Civil List Act of William IV, the hereditary rights in question were surrendered to the public, with a provision, repeated in 1 & 2 Vict. c. 2, that if the successor to the throne should so desire they should revive. No such desire has been expressed by His Majesty King Edward.

include customs duties in any form: so far as it falls on commodities, it falls on commodities made or prepared in the United Kingdom. But under the head of Excise appears a great variety of licences, for the grant of which money has to be paid to the Inland Revenue. Some of these licences are licences to sell commodities or to carry on a trade: the bulk of them are known as Establishment licences, and were formerly known as Assessed Taxes. They are in fact demands made by the State upon the citizen to pay for enjoyment of certain things of convenience or luxury, on the assumption that such enjoyment represents wealth which should thus be called upon indirectly to contribute to public needs. To employ a male servant, to keep a carriage, to use armorial bearings, may be taken to show that one who can afford these ornaments or comforts is able to assist the revenue. Before 1869 the system was to make the taxpayer pay for what he had enjoyed in the preceding year. In 1869 the Assessed Taxes were abolished *eo nomine*[1]. The taxpayer is now required to take out a licence for his existing establishment at the commencement of each year, and additional licences as the year goes on if his establishment should be increased.

§ 3. *Estate Duty.*

This is a general term for duties levied on property in course of devolution, and these are often described as the death duties. They include (1) a charge on the whole estate of a deceased person, real and personal, and this is the Estate duty strictly speaking, (2) succession duty to realty, and (3) legacy duty payable in respect of bequests of personalty.

§ 4. *Stamps.*

A stamp-duty is a convenient mode of levying a tax upon property in course of devolution, just as a licence is a convenient mode of taxing property the existence of which is indicated by the use of luxuries.

[1] 32 & 33 Vict. c. 14, part v.

Stamps and licences.

The two modes of taxation cannot fail to overlap. Whether a receipt for a tax imposed by the legislature is given in the form of a stamp or a licence must in many cases be immaterial. It would seem to be of no great importance whether the receipt for the *ad valorem* duty levied on the estate of a dead man is in the form of a licence to take out probate of the will, or a stamp affixed to an inventory of the dead man's estate. Nor would it matter that instead of a licence to keep a dog or kill game a stamped receipt for the money required to be paid was given to the payer. In fact, the distinction between stamp duties and other modes of taxing is not a difference in kind. It does not affect the incidence of taxation, but only the mode of collection. A certain amount of the money paid by the taxpayer must always go to the cost of collecting it, and it is the business of Government to diminish as far as possible the cost of collection. There are certain transactions which represent transfers of credit, or creations of liability which it would be difficult to tax otherwise than by requiring a stamp for their validity. But where the legislature demands from the heir a tax bearing a certain proportion to the property which he acquires by succession, the arrangement that the stamp affixed to the receipt of the money should indicate the amount paid, is merely a matter of convenience in collecting the revenue.

Division of Stamp duties.

The stamp duties must now be regarded as distinct from the death duties; these, though a stamp is made the means of collection, are in effect a tax on real and personal property in the course of devolution; while the stamp duties proper are levied upon a miscellaneous set of legal transactions which need a stamp for their validity.

The first stamp duties.

The first general Stamp Act was passed in 1694, when commissioners were appointed to prepare the stamps and collect the revenue thence arising. The value of the stamps ranged from £2 to 1*d.*, and the documents requiring to be stamped were forms of admission to offices or degrees, marriage certificates, certain writs, affidavits, copies of wills, pleadings and depositions, probates of wills and letters of

administration, documents under seal, and contracts not under seal [1].

Their extension.

These duties were increased from time to time, and additions were made to the documents which required stamps for their validity. Bills of exchange and promissory notes were brought within the Stamp Acts in 1782, ordinary receipts, for money paid, in 1784. The principle of taxing documents not according to their length, but according to the value of the transaction which they embodied, was of very gradual application. Introduced at first in the case of grants to offices in 1714, it was applied to receipts when they were first taxed in 1784, was extended to bonds in 1797, to mortgages in 1804, to conveyances by way of sale in 1808, to settlements in 1815.

In 1853 the application of the *ad valorem* principle to receipt stamps having proved onerous in practice, was abandoned, and a penny stamp made necessary for all sums of £2 or upwards. In 1881 the stamp so required was made uniform with the postage stamp, the Post Office handing over in each year to the Inland Revenue Department its share of the produce of the stamp.

§ 5. *Taxes.*

Taxation and hereditary revenue.

The early history of taxation in this country is difficult to disconnect from the history of the hereditary revenues of the Crown, for the earliest contributions of the country to the maintenance of a Court, and to the needs of self-defence, seem to have grown into matters of hereditary right, and then dwindled until it became necessary to find fresh sources of revenue. Kings were apt to treat these contributions either as Crown property, or as sources which might be drawn upon at will. The nation desired to define precisely the revenues which might be regarded as Crown property, to require the King to 'live of his own'; if more was required, to apply to the Commune Concilium Regni, or later to Parliament, for a grant in aid of his revenues; and

[1] 5 & 6 Will. & Mary, c. 21.

to apply the money so granted to the purpose for which it was intended.

Taxes in Saxon times.

The Saxon king conducted the business of the country with funds provided from the income of the royal estates and of the folkland, and from the produce of the *feorm fultum* due to him for the maintenance of his Court, sometimes rendered in kind, but more usually commuted for money. To this must be added a tax which the Danish invasions made necessary for the defence of the country, the Danegeld, a charge of 2*s.* on every hide of cultivated land.

Under the Norman kings.

Under the Norman kings the royal estates and the folkland became alike the property of the Crown, the *terra regis*: the King had therefore a more immediate command of the income thence arising. He retained the *ferm* of the shire, which now took the form of a composition for royal dues. The Sheriff became responsible for the collection of this sum in each shire, and for its payment into the Exchequer [1]. The Conqueror increased the Danegeld from 2*s.* to 6*s.* on the hide, and required an analogous payment from the towns. The Norman kings, as supreme landlords, enjoyed in addition the proceeds of feudalism, reliefs, aids, and the incidents due on military tenures. They made the administration of justice a source of revenue, from fines due on Pleas of the Crown, and payable through the Sheriff.

The new taxes of Henry II.

In the reigns of Henry II and his sons new forms of taxation arise. The *ferm* of the shire and the Danegeld had long been compounded for by the Sheriff at a fixed sum. They now disappear, except where some items remain among the hereditary revenues of the Crown. The taxation of Henry II, apart from these sources of revenue, was of three kinds, one falling exclusively upon the holders of land in chivalry, another upon all holders of land, a third upon all holders of property of any sort.

Scutage.

The first of these was the scutage, or composition for military service, at the rate of 2*os.* for each knight's fee.

Aid.

The second was a substitute for the earlier Danegeld.

[1] Stubbs, Const. Hist. i. 380, 383.

Under the various names of *donum, auxilium*, or carucage, it fell upon all land, and was computed by the hide, or later by the carucate of 100 acres. Where a payment of this nature was demanded by the King, the towns did not escape [1]: those which had bought immunity from the jurisdiction and assessment of the shire paid a fixed composition [2]; others compounded on each occasion with the officers of the Crown [3].

These are the two forms of taxation referred to in Magna Charta, where the King promises to levy no scutage or aid, other than the three feudal aids, save with the assent of the Commune Concilium. The third form of taxation fell upon all owners of rent or chattels. It was a tax of a tenth or some other proportionate part of such property. It first appears in the Saladin tithe, but, as the country became wealthier, personal property became a more fruitful subject for taxation, and in the thirteenth, fourteenth, and fifteenth centuries the tenth and fifteenth, which had become the common form of charge on town and shire respectively, became the usual mode by which the representatives of the Commons in Parliament met the needs of the Executive as represented by the Crown.

Taxes on personalty.

Before going further into modes of taxing real and personal property, let us note at once the statutory limitations on the powers of the Crown to levy taxes of this sort without consent of Parliament. A tax on movables would not be included under the term scutage or aid used in the Charter, but Parliament in its earliest days was prompt to close this door to royal acquisitiveness. The Confirmatio Chartarum dealt with *aids, tasks, and prises* generally, and contained a promise by the King that such charges should not be made 'but by the common assent of the realm.'

The king's right to tax.

The Confirmatio Chartarum.

The demesnes of the Crown still offered a wide field for arbitrary taxation, especially the towns in demesne. They were, in fact, the debateable ground between hereditary revenue and parliamentary grant. But after some years of royal exaction and parliamentary remonstrance a

The royal demesnes and the Statute of 1340.

[1] Stubbs, Const. Hist. i. 580, 584. [2] Ib. 584, 625. [3] Ib. 585.

Statute of 1340 provided against the nation 'being charged or grieved to make any common aid, or to sustain charge, except by common assent in Parliament[1].' The year 1332 was the last in which the King tallaged his demesnes[2].

The forced loans and benevolences of the sixteenth century, and the violent and illegal taxation of James I and Charles I, were met by the Petition of Right, which was conclusive against the legality of direct taxation in any form without consent of Parliament. The Bill of Rights declares in general terms the unlawfulness of levying money 'for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by Parliament.'

The Petition of Right.

The Bill of Rights.

To return to the forms of taxation. The old taxes, the scutage, and the aid cease in or about the middle of the fourteenth century; their place is taken by taxes on movables, and the customs duties of which I have already spoken. The taxes on movables assume the form of a fifteenth from the shire and a tenth from the borough[3], the tenth and fifteenth being reached by an assessment of cattle and crops, of chattels and stock-in-trade. But in 1334 a calculation was made by which the grant was estimated to produce £39,000, and henceforth the grant of a tenth and fifteenth meant a grant of £39,000 divided in certain proportions among the shires and boroughs. The form of the grant provided for an assessment of movables which, as a matter of fact, never took place.

Forms of taxation.

The 10th and 15th.

As the property on which the tax was supposed to be levied was never re-valued after the middle of the fourteenth century, the tenth and fifteenth became in process of time an unfair tax. It lingered on as an occasional mode of raising money into the seventeenth century, and the last grant of this kind was made in 1623. Its place was taken in the sixteenth and seventeenth centuries by the subsidy. Subsidy in this sense must be distinguished from the subsidy which meant those export and import

The subsidy.

[1] 14 Ed. III, st. 2, c. 1. [2] Stubbs, Const. Hist. ii. 520.

[3] Borough meant parliamentary borough: this was one cause of the reluctance of boroughs to be represented in Parliament.

duties which were called tunnage and poundage, and from the more general use of the term to mean a grant in aid of the ordinary revenues of the Crown. The subsidy of the sixteenth and seventeenth centuries meant a charge of 2*s.* 8*d.* in the pound on movables and 4*s.* in the pound on land[1]. A grant of an entire subsidy meant this, and several subsidies were sometimes granted at one time. Except during the Commonwealth this was the ordinary form of taxation until 1663, the clergy taxing themselves apart, though after 1533 the separate subsidies granted by the clergy were required to be submitted for confirmation to the Crown in Parliament. In 1664 the clergy gave up the practice of taxing themselves apart from the laity; at the same time taxation by subsidy was abandoned. The assessment of the taxable property seems to have been conducted with such unfairness or so little care that the poor man paid as much as the rich; and in 1663, when clergy and laity granted each four subsidies, the total amount produced was no more than £282,000.

After the year 1663 we hear no more of the subsidy as a mode of raising money. The ministers of Charles II had recourse to three other forms of direct taxation.

The poll-tax.

The first of these was a poll-tax, a charge of so much per head on each individual above sixteen years of age. The tax had been employed from time to time from 1377 onwards. It was never popular, and was imposed for the last time in 1698, expiring in 1706.

Hearth-money.

The second was hearth-money, a tax on all houses but cottages at a rate of 2*s.* for every hearth or stove. This was imposed in 1662: like the poll-tax it was 'grievous to the people,' and was repealed in 1689.

The assessment.

The third was the raising of a fixed sum divided among towns and counties, for every month, by an assessment of the value of all real and personal property in the places on which the contribution was levied. The practice began during the Commonwealth, and was adopted after the Restoration as a more effectual means of raising money

[1] Dowell, vol. i. p. 194. But the amounts varied from time to time.

than the subsidy. Though more productive than the subsidy, it was not a great success. The largest amount raised was rather more than a million and a half in the year, but complaint was made that personal property did not bear its fair share of the burden, and the practice ceased after 1691.

The Land tax

Personal property proved no less elusive to the revenue when, in the following year, the last attempt was made to lay a fixed and permanent charge upon all property, real and personal. The so-called Land tax of 1692 was, in effect, a subsidy at the rate of 4*s.* in the pound on real estate, offices, and personal property. The amount produced by this tax diminished year by year, till in 1697 Parliament gave up all hope of obtaining a fair return for the rate voted, fixed the sum that a rate of 1*s.* in the pound ought to produce, and apportioned the money to be raised among the towns and counties of the kingdom. Personal property and offices were to be rated as well as land, but since it was provided that the land should be liable for what the other sorts of property did not produce, the charge in the end fell wholly upon land.

a tax on personalty, but evaded.

Settlement of the land tax in 1798.

The tax fluctuated between 1*s.* and 4*s.* in the pound for just 100 years, and then in 1798 it was made perpetual by Mr. Pitt at the rate of 4*s.* in the pound. It thus became a permanent charge on the land in the proportion fixed by the assessment of 1692, and provision was made for its redemption by persons interested in the land on which it fell. The charge upon personalty, which had always been evaded, was dealt with as a separate tax annually granted. It does not seem to have come to more than £150,000, and was repealed in 1833. The tax on offices and their profits, after undergoing various modifications, was repealed in 1876.

The land tax, or so much as is unredeemed, remains a source of revenue, and a survival of a mode of taxing which depended for its efficiency upon a constant re-valuation of the real and personal property of the country, just as did the older taxes, the tenth and fifteenth, and the subsidy. Such a re-valuation was never carried out,

and every one of these taxes in turn became a fixed charge apportioned among towns and counties. The modern attempts to tax property begin with the Assessed Taxes of 1797, and the forms which such taxation has taken, and now follows, are four.

Modern taxation of property.

Income tax.

House duty.

Death duties.

The first is a tax on income, whether derived from property in land, capital invested in business, skill, or learning exercised in a profession. The second is a charge on inhabited houses, which, with various changes, has been levied since 1778. The third is a tax on property in the course of devolution, devolution from the dead to the living, falling on real and personal property, whether acquired by inheritance or disposition. Estate duty, legacy duty, and succession duty, now known collectively as the death duties, are in effect stamp duties. The fourth is a charge on apparent wealth, indicated by the use of certain articles of enjoyment: the taxes of this nature were until lately grouped under the head of Assessed Taxes, and are now collected in the form of excise licences.

Assessed taxes.

The income and property tax was first imposed by Pitt in 1799. It was then a graduated tax on incomes of from £60 to £200 a year, and a tax of 10 per cent. on all incomes above £200. It was dropped in 1802, revived in 1803 at the rate of 5 per cent. on all incomes of £150 and upwards, and was increased from time to time until its repeal in 1815. The tax was revived again by Sir Robert Peel in 1842, at the rate of 7*d.* in the pound, and has continued in existence at varying rates ever since. It falls upon incomes the sources of which are classified as (1) rents and profits arising from property in land, (2) profits arising from the use or occupation of land, (3) investments in the public debt or liability of our own country, its colonies, or any foreign state, (4) the exercise of a profession, trade, or other occupation, (5) employment by the State, or in any corporation or company.

The Income tax.

Of these four modes of taxing property, the income and property tax and the inhabited house duty alone come under the head of *taxes*, for the *death duties* are levied by means of stamps, and the *assessed taxes* are now excise licences.

§ 6. *Post Office and Telegraph Service.*

The Post Office as a source of revenue dates from the reign of Charles II, though James I deserves the credit of having started a post office to foreign countries for the convenience of English merchants, and Charles I, in 1635, made arrangements for the transmission of letters in England and Scotland, fixing the rates of postage by royal proclamation. The business was entrusted to a Postmaster, who took the risks and profits of the undertaking. In 1660 the Post Office was organized and privileged by Statute [1], and its proceeds made part of the hereditary revenues of the Crown, and in 1663 its revenues were settled in perpetuity on the Duke of York [2]. In 1685 they were again settled on James II as *king*, his heirs and successors. In 1710 the Post Office was again remodelled, and an appropriation of its income made between the civil list and the public service. Since 1760 the hereditary revenues thence arising have been merged in the general revenue, under the Civil List Acts, and since 1787 have been paid into the Consolidated Fund.

The Post Office in the 17th

and in the 18th century.

The extent of postal operations has varied much at different times. The Post Office began, in the reign of James I, as a means of communication for English merchants trading in foreign countries; it continued to undertake foreign postage throughout a great part of the wars of the reign of Anne, conveying not only letters but articles of a very varied sort [3]. In 1710 its operations were contracted and systematized. A Post Office was provided for Great Britain, Ireland, and the Colonies, and a Postmaster-General appointed to superintend the whole, the office

Extent of its operations.

[1] 12 Car. II, c. 35. [2] 15 Car. II, c. 14.

[3] The following are examples of these consignments:—

Fifteen couple of hounds going to the King of the Romans with a free pass.

Dr. Crichton carrying with him a cow and divers other necessaries.

A box of medicines for my Lord Galway in Portugal.

Two servant maids going as laundresses to my Lord Ambassador Methuen.—See Return on Public Income and Expenditure, 1869, Parl. Papers 1868–9 (366), part ii, p. 428.

having previously been carried on by one or more persons under the superintendence of a Secretary of State.

The extension of the operations of the Post Office is a part of our social and economical history. The department undertakes upon certain terms to convey by post letters, newspapers, books, parcels, and patterns or samples; it transmits communications by telegram; it transmits cash by means of money orders and postal orders; it receives and takes care of small savings, and has thus a banking establishment which is responsible for more than £152,000,000; it acts as an office for insurances on life for sums within the limits of £5 and £100, for the purchase of annuities within the limits of £1 and £100, for investments in Government stock to an amount not exceeding £500.

Their variety.

Its income.

The Post Office is therefore not merely a means of communication throughout the United Kingdom and the Colonies: it is also a means of bringing the appliances for thrift within reach of the poor. The growth of its income should be noted. In 1838, the last year before the general reduction of charges, the net income was £1,676,522, the cost of management amounting to £669,756; in the financial year ending March 31, 1869, it was £2,176,660, the cost of management amounting to £2,376,920; in the financial year ending March 31, 1907, the cost of management (including that of the Telegraph service) amounted to £17,374,251, and the amount paid into the Exchequer £17,880,000. The Telegraph service cost £3,754,793 out of the above-named sum, and brought into the Exchequer £4,420,000, but against this must be set the interest of the money invested in the purchase of the property of the Telegraph Companies.

Its privileges.

The exclusive privileges of the Postmaster-General as regards the conveyance of letters rest on 1 Vict. c. 33, s. 2; as regards the transmission of messages by telegraph[1], on 32 & 33 Vict. c. 73, s. 4.

[1] The Telegraph Act of 1863 defines a telegraph as 'a wire used for the purpose of telegraphic communication,' and this definition has been held to include a telephone. *Attorney-General* v. *Edison Telephone Co.*, 6 Q. B. D. 248.

§ 7. *The Crown Lands.*

The Crown Lands are the only source of the hereditary revenues of the Crown which we need consider, though it may be well to bear in mind that there are other sources of hereditary revenue which are not now collected, or which are surrendered to general or specific purposes [1]. The net produce of such of the Crown lands as are part of the general revenue of the country, amounted in 1894 to £410,000, in 1907 to £520,000. These lands include all the hereditary landed property of the Crown except the Duchies of Lancaster and Cornwall, which remain a source of private income to the King and the Prince of Wales respectively.

The rights of the Saxon king;

Before the Conquest the King had rights over land of three sorts. He held lands of his own, his private property; he held lands in right of his kingship, demesnes of the Crown; he enjoyed rights over the folkland, of a somewhat uncertain character, but including certainly an initiative in granting portions of it to individuals or corporations: to the exercise of this right the Witan were legally parties, though under the later Saxon monarchy their share in making the grant was merely formal.

of the Norman.

After the Conquest these three rights of the Crown merge in one, the right of the King over the Crown lands. The feudal King is the lord of the land, of whom all estates are mediately or immediately held. All land, therefore, which is not held by the tenants-in-chief or their vassals is the King's; the folkland, the reserve of national property, becomes the *terra regis*. Feudalism, which thus extended the rights of the Crown, provided also in the rules of escheat and forfeiture a means for their further extension. But at the same time the King ceases to be a private owner. The lands which he holds he may use for the maintenance of his own power, or for the security of the nation; he may sell them or give them away, but he

[1] These are the hereditary excise, the hereditary post office duties, and some smaller branches of hereditary revenue, for which see Return, 1869, part ii, pp. 456, 457.

can hold no land except as King; his property is inseparably associated with public duty.

The Duchy of Lancaster.

An illustration of this rule is found in the fate of the Duchy of Lancaster, the private property of Henry IV before he ascended the throne. An Act of Parliament was needed to prevent the merger of the Duchy in the Crown lands, an Act obtained in the first instance by Henry IV, repeated with somewhat different provisions by Edward IV, and re-enacted from time to time until the present day. In times when the succession was in dispute, it is not difficult to understand the desire of the King to secure the property of his family to himself and his heirs.

Parliamentary supervision.

A result of this rule may be seen in the constant supervision exercised by Parliament over the grants of land made by the King. The history of the royal seals indicates the desire to prevent the making of improvident grants; and if, in spite of these precautions, improvident grants were made, Parliament not unfrequently required their resumption. The history of the Crown lands is therefore one of constant fluctuation in extent and value. Escheats, forfeitures, and the seizure of the estates of religious houses, increased the property of the Crown. Profuse grants to courtiers and favourites, sales made, as by Elizabeth, to save the taxpayer, or, as by Charles I, to avoid a summons of Parliament, reduced that property, till during the reign of William III its income was estimated at £6,000 a year.

But Parliament, after the Revolution, was determined to control the amount and manner of the expenditure of public money. The sum to be placed at the disposal of the King was limited, and the objects on which money should be spent were marked out in the Civil List. It was estimated that a part of that sum would be provided by the income of the Crown lands, and Parliament could not allow the King to falsify this estimate by alienating at his pleasure the sources of the income calculated upon.

The Civil list.

When Anne succeeded to the throne, the Act which settled the revenue for her reign restrained the Crown, for that

and all future reigns, from alienating the Crown lands. During three reigns the Crown lands formed a constituent part of the Civil List. The hereditary revenues were supplemented by Parliamentary grant calculated to produce the amount which would enable the King to maintain his Court and pay the Civil services. The Crown lands could not be diminished by alienation, but they might fluctuate in value, and this introduced an element of uncertainty into the calculations of Parliament. George III on his accession surrendered to Parliament his interest in the Crown lands for his life, receiving in return a Civil List of a fixed amount, and his successors have followed his example as to the land revenues of the Crown in England and Wales. Since the beginning of the reign of George IV the same practice has been adopted with regard to the land revenues in Scotland and Ireland.

Crown lands and Civil List.

§ 8. *The Revenues of Scotland and Ireland.*

The revenues of Scotland and Ireland call for a brief notice. At the time of the union with Scotland the Crown had certain hereditary revenues corresponding in character to those of the English Crown, and consisting in part of the rights of a feudal lord, in part of income arising from customs and excise and the Post Office, annexed to the Crown by Acts of the Scotch Parliament.

The receipt and issue of the revenue took place in the Scotch Exchequer, and the Court of Exchequer controlled the accounts of the Treasurer and Great Chamberlain, the officers of state responsible for the collection of the revenue. The Act of Union constituted the Scotch Court of Exchequer not merely a Court for the decision of revenue cases, but an office in which the collectors of the revenue presented an account of their receipts; this, when allowed by the Court, was passed on to other officers till a discharge was ultimately obtained at the Pipe Office. But in 1832 all powers and duties relating to the administration of the revenue were taken from the Exchequer and transferred to the Treasury at Whitehall.

The Scotch Exchequer.

Taxation of Scotland.

The financial settlement between England and Scotland at the Union provided that, with certain exceptions as to the operation of existing taxes, the same customs and excise duties should be levied in both countries. Stamp duties were extended to Scotland by 10 Anne, c. 19, and uniformity of postal arrangements was established by 9 Anne, c. 10. Taxation is uniform for the two countries, and since 1822 no distinction has been made between their revenues in the finance accounts of each year.

The revenue of Ireland.

In Ireland, as in England, the Crown had certain hereditary revenues, and the proceeds of certain taxes, customs, and excise duties granted from time to time by the Irish Parliament. But it is not necessary to trace the history of the revenues of Ireland, of its financial staff, or of its public debt. By the terms of the Union with England in 1801 these were kept distinct, but provision was made for their consolidation in certain contingencies. This consolidation was effected in 1817, when the offices of Lord High Treasurer of England and of Ireland were united, the revenues of the two countries brought into one fund, charged with the payments of the National debts of the two countries, which were henceforth to be treated as one[1]. The subsequent changes of 1834 and 1866 as to the Exchequer offices, as to the mode of controlling receipts and issues, and the audit of accounts, have consequently been applicable alike to Ireland and to England.

Section II

Collection and Expenditure of Revenue

Introductory.

In order to understand so much as it may be needful to state of the history of this subject, it will be well to summarize the practice of the present day in the collection and expenditure of the revenue and the audit of the national accounts.

[1] This was under the provisions of 56 Geo. III, c. 98, which took effect on the 5th January, 1817.

Collection of Revenue.

The revenue is collected by four great departments; the Customs, the Inland Revenue, the Post Office, and the Commissioners of Woods and Forests. Other departments receive moneys directly or indirectly in the course of their business from fees, the sale of old materials, or similar sources. Sometimes these are used by the department as 'appropriations in aid' of the amount granted by Parliament to meet departmental expenditure. Sometimes they are paid into the Exchequer and then fall under the head of revenue described in the Finance accounts as 'miscellaneous.'

Revenue paid into Consolidated Fund.

Every sum received by these departments is paid into the Consolidated Fund of the United Kingdom; that is to say, it is paid to the credit of the Exchequer account at the Bank of England; or, in Ireland, at the Bank of Ireland. From this fund nothing is paid except by Parliamentary authority. When the authority of Parliament has been given, the King directs issues to be made in pursuance of it by an order to that effect countersigned by two Lords of the Treasury.

How issued.

Control of issue.

But this order is not of itself sufficient to procure an issue of the money for the objects specified by Parliament and the King. It empowers the Treasury to call upon the Comptroller and Auditor-General to give to the Lords of the Treasury a credit on the Exchequer account at the Bank. When this credit is given the Bank is requested to transfer the sums specified to the account of the Paymaster-General, and the Paymaster-General is thus enabled to make the payments required by the several departments in accordance with the votes of Parliament. So far security is taken that money voted by Parliament is issued for the purposes indicated by Parliament; it remains to secure that the money is not only issued but spent in accordance with the votes.

Audit of accounts.

So we must note that the Comptroller-General is also the Auditor-General. In that capacity he must satisfy himself by an examination of the accounts, either periodical or concurrent during the financial year, that the payments for which he has given credit are not merely

spent on the public service, but have been spent on the services for which he set free the Exchequer balance; that is, for the services specified by Parliament. If not satisfied on this point he must report the facts to Parliament in detail. When the House of Commons receives the departmental accounts of the expenditure on the several votes, together with the Comptroller and Auditor-General's report thereon, they are referred to the Public Accounts Committee, which in its turn reports to the House. Thus the circle is complete: the House which voted money for certain purposes receives full information as to the expenditure of the money on those purposes.

Completeness of Parliamentary control.

§ 1. *History of the Exchequer Offices.*

With this brief outline of the present mode of receipt and expenditure of the public money in our view, we may go back and trace the older system of the Exchequer[1].

Money used to be paid into Exchequer.

It must be borne in mind that until comparatively recent times the various collectors of revenue actually paid the sums collected by them into the Exchequer, where the money was kept in the Tellers' offices until it was required for public service. The sheriffs were, in the early days of the Exchequer, the great collectors of revenue. In time their functions in this respect vanished before new sources of revenue and new modes of collection, but the Exchequer of Receipt remained the storehouse to which and from which the public money came and went.

Later into the Bank of England.

Late in the eighteenth century it became the practice to make these payments into and out of the Bank of England; but every day and all day they were accounted for, as made, to the Exchequer, and in the evening the Tellers' chests were opened, and money was paid in or taken out as the balance might be in favour of the Exchequer or adverse to it[2].

[1] The reader who is interested in this part of our constitutional history should refer to The Antiquities of the Exchequer, by Mr. Hubert Hall.

[2] Return Public Income and Expenditure, 1869, Parl. Papers 1868-9 (366), part ii. pp. 342, 343. See too Recollections of a Civil Servant, Temple Bar Magazine, Feb. 1891, at p. 209.

As I shall frequently have to refer to the Return of 1869, I shall for brevity's sake refer to it thus, Return, 1869, ii.

The Norman Exchequer was divided into two Courts: the Upper or Exchequer of Account, the Lower or Exchequer of Receipt. The Upper Exchequer, consisting of Treasurer, Chancellor, and other great officers, the Barons of the Exchequer, exercised a control over all persons who collected or expended the royal treasure. Accounts were here audited and those legal questions relating to revenue were here determined which gave its original jurisdiction to the Court of Exchequer. But the Lower Exchequer or Exchequer of Receipt is that which has most interest for us. The Norman Exchequer.

The Upper Exchequer developed in two directions. Its revenue jurisdiction, extended by fictions, made it into a great Common Law Court, severed except in a formal sense from the ancient Exchequer. Its duty as a place of account and audit was discharged with less and less efficiency, till at the end of the eighteenth century the lucrative sinecures which purported to be offices of audit were abolished, and the duty of auditing the public accounts was assigned to a body which has no historical connexion with the Exchequer of Account. The Exchequer of Account.

As some of the King's revenue was paid at the King's palace, 'in camera regis [1],' the Chamberlain was, with the Treasurer, a chief officer of the Exchequer of Receipt. The Chamberlain's office broke up into three: the hereditary sinecure office of the Lord Great Chamberlain, the King's Chamberlain, and the Chamberlains of the Exchequer. The Exchequer of Receipt; its officers;

Payments out of the Exchequer were made in pursuance of a royal order under the Great or Privy Seal, usually addressed to the Treasurer and Chamberlains. its procedure in payment;

Payments into the Exchequer were recorded by the Treasurer's chief clerk and the two Chamberlains.

The payer of money into the Exchequer received a tally, or one half of a notched stick split down the middle; the notches corresponded to the amount paid, and that amount

[1] Madox, cited in Return, 1869, ii. pp. 340, 341, and see Stubbs' Const. Hist. ii. 276, as to the confusion, in the fourteenth century, of the household and the national accounts.

was also written at the side. The other half was kept at the Exchequer. Similar tallies were given to persons who were entitled to receive money from the Exchequer, where it was intended that they should obtain the money from some public accountant on its way to the Exchequer. The first sort of tally was called a Tally of *Sol*, the second a Tally of *Pro*[1].

These tallies were in use until 1826, when, by the death of the last of the Chamberlains, an Act passed forty-four years earlier came into operation[2], and their use was discontinued.

in account.

The ancient process of the Exchequer was simple. Three officers, the Treasurer's clerk and the two Chamberlains, kept three separate accounts of money received; they paid out money due under orders properly authenticated from the Crown, and kept a similar triple record of money so paid. These last were called pells of issue, or parchment rolls on which the money paid out was entered. The accounts of each officer were compared with those of the other two, daily, weekly, half-yearly.

Changes of 16th century.

In the reign of Henry VII this record of issues was discontinued, but that of receipts was still made, for a century in triplicate, afterwards by one of the Treasurer's clerks.

The Tellers.

The issue and record of issue of public money was placed in the hands of four new officers, the Tellers of the

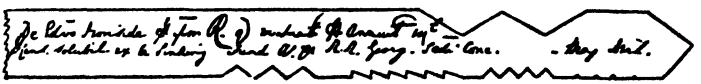
[1] The scale of notches was as follows :—

1½ inch, £1000.

1 ,, £100.

⅜ ,, £10; a half notch of this size denoted £1.

$\frac{3}{16}$,, a shilling; the smallest notch a penny; a small round hole a halfpenny; a cut of a notch denoted half the amount.



£236 4*s.* 3½*d.*

[2] 22 Geo. III, c. 82. The rest of their history is not commonplace. The returned tallies were stored in the ancient Star-chamber, which they filled from floor to ceiling. When, in 1834, it was desired to use this room, orders were given to destroy the tallies. They were used as fuel in the stoves which warmed the Houses of Parliament; they overheated the flues, and burned down the Houses.

Exchequer, who accounted to the clerks of the Treasurer for disbursements made.

The Chamberlains.

Of the three parties to the triplicate record of earlier times the Chamberlain's duties dwindled to the preparation and custody of the tallies; but the clerical staff of the Treasurer developed for themselves a new, and, as it proved, a very remunerative sphere of activity.

The Auditor of Receipt.

One of them received and audited the Tellers' accounts, and hence was called Auditor of Receipt; in course of time his concurrence became necessary to the issue of money.

The Clerk of the Pells.

Another, whose duty it had been to write out a pell or parchment of the receipts, obtained authority under the Privy Seal to make a similar pell of the issues. His office, that of Clerk of the Pells, became a record office of all receipts and issues.

Here we have the Exchequer staff down to the year 1834. Four Tellers, who received and paid out the revenue; two Chamberlains, who struck the tallies and examined the two parts to see that they corresponded; a Clerk of the Pells, who recorded all issues and receipts; an Auditor of Receipt, who kept a similar record, and who had important duties with respect to the issue of money.

Use of these offices in the 18th century;

These offices were paid until the commencement of the nineteenth century by fees and percentages; their duties were discharged by deputy, and they formed the great prizes of political life, whereby a minister was enabled to provide for his family.

The names of those who held these offices in 1821 is significant of the objects which they served. The four Tellers were Lord Camden, Lord Bathurst, Mr. Charles Yorke, and Mr. Spencer Perceval; the Clerk of the Pells was Mr. Henry Addington; the Auditor of Receipt was Lord Grenville.

their emoluments.

As the income and expenditure of the country grew the emoluments of these offices became enormous. In 1783 Parliament settled their salaries at fixed sums: £4,000 a year for the Auditor, £2,700 for each Teller; £1,500 for the Clerk of the Pells. The change was to take effect as vacancies occurred; but in 1812 Lord Camden, the last of

the Tellers under the old system, volunteered a surrender of so much of his emoluments as exceeded £2,700 a year. When these offices were abolished in 1834 Lord Camden was still a Teller, and his contribution to the revenue had amounted to £244,000, being the amount of his fees in excess of the statutory payment. He was nearly a quarter of a million the poorer for putting himself on a par with his fellow sinecurists at £2,700 a year.

§ 2. *The Course of the Exchequer.*

We may now study the working of this machine. But we must bear in mind that the Treasurer and the Chancellor of the Exchequer were the officers ultimately responsible; that they were responsible to the King; that the Exchequer was a means of ensuring that the King got his rights, and paid no more than he was obliged to pay; and that the idea of a Parliamentary control over the issue and expenditure of the Exchequer receipts was foreign to the minds of those under whose care the machinery of the Exchequer was elaborated.

Parliamentary control.

The relations of Parliament to the expenditure of the revenue may be said to have passed through three stages.

First stage.

In the first a life-income was assigned to the King, in addition to his hereditary revenues, to be spent as he pleased. So long as the King did not exceed this income Parliament asked no questions. If he wanted more, Parliament was moved to ask where the money had gone, and why more was wanted; but the Commons were more concerned to prevent illegal taxation than unauthorized expenditure.

Second

The second stage begins with the appropriation of subsidies to special purposes in the reign of Charles II. From that time until 1834 Parliament endeavoured through the existing machinery of the Exchequer to secure that money granted for special purposes should only be issued for those purposes, and to construct a system of audit which should secure that the money was not only *issued for* but *expended upon* those purposes.

Third stage.

The third stage begins with the year 1834, when the old offices were abolished and a system commenced, ending in the legislation of 1866, whereby the control of issue and the audit of accounts are brought into the same hands, and the result reported to the House of Commons.

First stage.

Legal control over royal action.

Of the first stage I need say little. But it should be noted as a check on the powers of the Crown in administration that the King's command was not enough to authorize an issue of his treasure; that such a command must be authenticated by letters patent or writ under the Privy Seal. And further that the withdrawal of the Treasurer from active participation in the routine of the Exchequer led to a complicated system of Treasury warrants, preliminary to the issue of public money, known as 'the course of the Exchequer,' and strictly enjoined upon the officers for the receipt and issue of public money by 8 & 9 Will. III, c. 28.

Second stage.

Appropriation of supply by Parliament.

The second stage began with the appropriation to certain purposes of subsidies granted to Charles II. It was developed after the Revolution into a complete appropriation of all supplies except the hereditary revenue. Even these were considered as practically appropriated to the Civil List, and were taken account of in the sum assigned to the purposes of the Civil List. From the time that George III surrendered his hereditary revenues no money could be expended without the consent of Parliament. The revenues of the Crown have come to be recognized as public money, as a part of the revenues of the country.

The second stage in working.

So I will endeavour to trace the control of issue and the history of the audit of accounts as they existed between 1688 and 1834.

We must suppose that Parliament has granted certain sums to the Crown to be raised from certain sources, and applied to certain purposes. We must further suppose that the various persons whose duty it is to collect the revenue have duly collected it and paid it into the King's Exchequer. The money is there: how is it to be extracted and applied to the purposes for which the King's ministers have asked for it from Parliament?

Issue of public money.

The process began then, as now, with a royal order, which was an authority for letters of Privy Seal. These were transmitted through the Treasury, together with a Treasury warrant for the issue of the money required, to the Auditor of Receipt. That great personage himself signed an order for payment, and returned it to the Treasury with the warrant. Both documents came back signed by members of the Treasury Board, together with a letter specifying the date at which the money was to be issued, and the fund out of which it was to be paid[1].

The Tellers.

Thereupon the Tellers unlocked one of the four chests, one of which was kept in the room of each Teller. Even this could not be done without the aid of the Auditor and the Clerk of the Pells, for each chest had three locks, and Teller, Auditor, and Clerk each had the key of one. So when the deputies of these three functionaries had opened a chest, and had handed some portion of its contents to an individual payee or to a Bank cashier to be placed to the credit of a department which had an account at the Bank of England, the Exchequer had done its work as regarded that particular *item* of expenditure.

The Auditor,

The Auditor of Receipt was the hinge on which turned the lid of the Treasury chest, for the Act of William III[2] forbade the Tellers to issue money without his order. He was in fact a Controller rather than an Auditor. His functions were to see that money was legally issued, not that it was properly spent.

how far useful.

The value of the office to the public service would depend entirely on the independence of the Auditor in respect of political or party ties, for it would be his duty to resist attempts on the part of the Crown or its ministers to use public money either without Parliamentary authority or for purposes other than those authorized by Parliament.

Lord Grenville as Auditor;

How far the holder of the office took this view of his duties may be learned from the conduct of Lord Grenville. He was Auditor of Receipt from 1794 to 1834, when he held a prominent place in politics as leader of the Whig party.

[1] Return, 1869, ii. p. 343.

[2] 8 & 9 Will. III, c. 28.

In 1806 he became Prime Minister, and proposed to take the office of First Lord of the Treasury. In this capacity he would be responsible for the royal orders and Treasury warrants, the validity of which he would have to consider as Auditor. when Prime Minister;

But he did not propose to resign the Auditorship, and when the incompatibility of the two offices was suggested in the House of Commons it was suggested in a tone of apology lest the objection should savour of constitutional pedantry. Eventually Parliament enabled Lord Grenville to place the Auditorship in the hands of a trustee during his continuance at the Treasury Board[1]; but it is plain that neither he nor his friends saw any incongruity in the tenure by the same man of two offices, one of which involved the giving of orders for the issue of public money, while the other was solely concerned with seeing that those orders were valid.

In 1811 Lord Grenville was in opposition. The party of which he was a leader was extremely anxious that a Regency Bill should be pushed on, and that it should impose the least possible restraint upon a Regent who was supposed to favour the Whigs. The King was mad, and the forms of government, where he was concerned, could only be supplied by a fiction. Parliament had voted £500,000 for the army and as much more for the navy: the money was in the Tellers' chests and the payment was urgently needed. The Lords of the Treasury, acting on the vote of Parliament, sent a warrant for payment to the Auditor, but there was no authority under the Privy Seal, because, while the King was mad, the sign manual could not be obtained to authorize the affixing of the Privy Seal, and the clerks of the Privy Seal had scruples. when in Opposition.

So too had Lord Grenville. When Prime Minister he had thought so little of the duties of the Auditor as a control